TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

[redacted] 1924

No. [redacted] 126

A. L. MAY, AS TRUSTEE IN BANKRUPTCY OF GEO. W. COWEN CO., INC., BANKRUPT, PETITIONER,

vs.

J. M. HENDERSON, JR., AND T. J. SCANNELL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 24, 1925.

CERTIORARI AND RETURN FILED NOVEMBER 7, 1925.

Red wheat
Wheat is a crop by itself
Every bushel that comes, it adds
just because the farmer
produces one bushel
it adds to the

The decree of the District Court said
"There is no question here of directing
the bank to pay over the funds claimed
by it. The order is that the
assignee pay over to the Trustee
They received the money as Trustee
for the Creditors of the bankrupt, and
as such they are bound to account for
it. And affirmed the order of
the Referee

20 Cch 22212

Answer of the ~~Trustee~~ Assignee,
averred that the bank had a right to hold
the money as a partial set off; and
that they were without lawful
right or power to retain it.
No case to send notify the making of
the order in the summary proceeding.
The answer "I am not able" is
insufficient to relieve the ~~Trustee~~ As-
signee.

(29,760)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 450

A. L. MAY, AS TRUSTEE IN BANKRUPTCY OF GEO. W. COWEN CO., INC., BANKRUPT, PETITIONER,

vs.

J. M. HENDERSON, JR., AND T. J. SCANNELL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 3, 1923

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United States Circuit Court of Appeals for the Ninth Circuit.

IN BANKRUPTCY—No. ——.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

Petition to Revise in Matter of Law.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

The petition of J. M. Henderson, Jr., and T. J. Scannell respectfully shows:

I.

That Geo. W. Cowen Co., Inc., a corporation, formed under the laws of the State of California, was, on November 31, 1920, adjudged a bankrupt by the United States District Court for the Northern District of California, Northern Division, and by the same order the proceedings in said matter were referred to S. W. Cross, Referee in Bankruptcy of said court at the City of Sacramento, State of California; therafter the appellee, A. L. May, was appointed trustee of the estate of said bankrupt, qualified as such on December 16th, 1920, and has ever since continued to act as such.

II.

That thereafter the following proceedings were had in the case of said bankrupt:

On January 28th, 1921, said trustee petitioned said referee for an order requiring the appellees, Henderson and Scannell, to pay over to him moneys belonging to the bankrupt estate, which, it was

alleged in said petition, were collected by the appellees while conducting the business of the bankrupt under an assignment to them in trust for the benefit of the creditors of the bankrupt. The referee issued an order to show cause and the appellants filed an answer denying that they had collected said moneys as trustees under the alleged assignment for the benefit of the creditors or that they or either of them had ever acted under said alleged assignment or that said assignment ever became effective and averred that the appellant Scannell was the manager of the bankrupt's business prior to the times mentioned in the petition and had continued to act as such during the times so specified, to wit, from September 15th, 1920, to November 4th, 1920, and that during said times he had collected on account of sales made in the course of business the sum of $22,671.58—and had deposited the same in the Fort Sutter National Bank of Sacramento, in accordance with the custom of the bankrupt during the entire time it had been in business; that Scannell had withdrawn from said bank at various times during said period the sum of $9,787.77—with which to pay current expenses of said business. They also aver that the balance of $12,883.91, which had not been so withdrawn from the bank was held by the bank under a claim that it had a right to offset against said deposit a note of said bankrupt to said bank for the principal sum of $15,000, which it then held.

It was further averred that such deposits so made by Scannell were not made with any intent to prefer the bank but were made pursuant to the theretofore custom of the bankrupt.

Upon the hearing of the issue raised by the petition and answer the evidence was conflicting as to whether Henderson and Scannell ever acted under the alleged assignment and as to whether said assignment ever became effective. The evidence showed without contradiction that the moneys referred to were collected during the time Scannell had the immediate charge of the conduct of the bankrupt's business and that said moneys were, from time to time, deposited in the Fort Sutter National Bank by the cashier of the bankrupt under the names of J. M. Henderson, Jr., and T. J. Scannell, trustees; that during the time mentioned in the petition the pay-rolls and other current expenses of bankrupt were paid by checks on these deposits signed by Scannell alone as trustee, and that no deposits or checks were made or signed by Henderson; that prior to September 15th, 1920, and ever since the bankrupt had been in business it had carried a deposit account with the Fort Sutter National Bank; on that date, at the instance of Scannell or the cashier of the bankrupt the deposit account was changed to the names of Henderson and Scannell, trustees; that thereafter by the direction of Henderson the account was changed back to the name of the bankrupt; that the Fort Sutter National Bank at all said times held and owned a note of the bankrupt

for the sum of $15,000; that prior to the filing of the petition for the order to show cause the Fort Sutter National Bank applied all of said balance of $12,883.91 on the said note of the bankrupt to it for $15,000; that thereafter the Sacramento-San Joaquin Bank purchased all of the assets and assumed all of the obligations of the Fort Sutter National Bank and is now its successor in interest; that said Fort Sutter National Bank and Sacramento-San Joaquin Bank as the former's successor in interest hold said moneys under said claim of right of setoff, and the same is not in the possession or control of the appellants or either thereof except that at all times herein mentioned said Henderson was the President and chief executive officer of the Fort Sutter National Bank and of the Sacramento-San Joaquin Bank and exercised such control of said banks as was inherent to his position as such officer, but that Scannell was at no time connected with either of said banks.

The appellants objected to the jurisdiction of the referee and at all times contended that the controversy was one between the trustee and said banks on a claim made by the latter in good faith. Neither of said banks was a party to the proceedings and neither consented to the jurisdiction of the referee to try the validity of their claims.

III.

That on the 23d day of June, 1921, the said referee in bankruptcy made an order directing and requiring said Henderson and Scannell to pay over to the trustee said sum of $12,883.91, and on the 8th

day of March, 1922, an order and decree was made and entered by the said United States District Court for the Northern District of California, Northern Division, and by Honorable Maurice T. Dooling, Judge thereof, affirming the order of said referee, copies of both which orders are hereto attached.

IV.

That said orders and decree were erroneous, in that the said referee and the said Court erred as follows:

The said referee erred:

1. In ordering and requiring the appellants to pay over to the trustee in bankruptcy moneys, which were not in their or either of their possession or control.

2. In assuming jurisdiction to try the validity of the claim to said moneys by said banks without their being made parties to said proceedings and without their consent to the assumption of such judisdiction.

The said District Court erred:

3. In affirming said order of the referee.

4. In not reversing and annulling said order of the referee.

5. In not directing the referee to discharge the said order to show cause.

Wherefore, your petitioners, feeling aggrieved because of said orders and decree, ask that the same may be revised in matter of law by your Honorable Court, as provided in Section 24b of the Bankruptcy Law of 1898, as amended and the rules and

practice in such cases provided, and that said orders and decree be reversed and annulled.

T. J. SCANNELL,
By A. A. DeLIGNE,
Attorney.

J. M. HENDERSON, Jr.,
ARCHIBALD M. JOHNSON and
A. A. DeLIGNE,
Attorneys for Petitioners.

State of California,
City and County of San Francisco,—ss.

J. M. Henderson, Jr., being first duly sworn, deposes and upon oath says:

I am one of the petitioners above named; I have read the foregoing petition, and know the contents thereof; that the same is true, according to the best of my knowledge, information and belief; that said petition is not made or filed for delay but is made and filed because petitioners believe injustice would be done if said orders and decree should be carried into effect. Affiant further states that T. J. Scannell the other petitioner is now a resident of the State of New York, and is not within the State of California, as affiant is informed and believes and for that reason he makes this affidavit on behalf of said Scannell, as well as for himself.

J. M. HENDERSON, Jr.

Subscribed and sworn to before me this 17th day of March, 1922.

[Seal] MAUD FORMAN,
Notary Public in and for the City and County of San Francisco, State of California.

In the Northern Division of the United States District Court, for the Northern District of California, First Division.

No. 495.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

HENRY A. JACOBS, Esq., and G. B. BLANCKENBURG, Esq., Attorneys for Trustee.

ARCHIBALD JOHNSON, Esq., and A. A. DeLIGNE, Esq., Attorneys for Respondents.

ON REVIEW OF REFEREE'S ORDER DIRECTING J. M. HENDERSON, JR., AND T. J. SCANNELL TO PAY TO THE TRUSTEE IN BANKRUPTCY $12,883.31.

There is no question here of directing the bank to pay over funds claimed by it. The order is that J. M. Henderson, Jr., and T. J. Scannell pay over to A. L. May, Trustee in Bankruptcy, the sum of $12,883.31. This money they received as trustees for the creditors of the bankrupt, and as such trustees they are bound to account for it. The order is therefore affirmed.

March 8th, 1922.

(Signed) M. T. DOOLING,
Judge.

In the District Court of the United States in and for the Northern Division of the Northern District of California.

No. 495—IN BANKRUPTCY.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

ORDER DIRECTING J. M. HENDERSON, JR., AND T. J. SCANNELL, TO PAY OVER TO A. L. MAY, TRUSTEE IN BANKRUPTCY, THE SUM OF $12,883.81, BELONGING TO THE ESTATE OF THE ABOVE-NAMED BANKRUPT.

The application of A. L. May, Trustee in Bankruptcy of Geo. W. Cowen Co., Inc., Bankrupt, for an order requiring J. M. Henderson, Jr., and T. J. Scannell, to account and pay over to said A. L. May, said trustee in bankruptcy, proceeds of certain property belonging to said estate, alleged to be in possession and under the control of said J. M. Henderson, Jr., and T. J. Scannell, coming on regularly for hearing before me as referee, upon the verified petition of said A. L. May, trustee in bankruptcy, as aforesaid, and the verified answer of said J. M. Henderson, Jr., and T. J. Scannell, said A. L. May, as trustee in bankruptcy, being represented by Henry A. Jacobs, Esq., his attorney, and J. M. Henderson, Jr., and T. J. Scannell being represented by A. A. DeLigne, Esq., their attorney; and evidence, oral and documentary, having been introduced, and the matter having

been duly heard and testimony taken, and the matter having been submitted and briefs filed;

And it appearing that said J. M. Henderson, Jr., and T. J. Scannell having in their possession and under their control the sum of twelve thousand eight hundred eighty-three and 81/100 (12,883.81) dollars belonging to said bankrupt estate,—

NOW, THEREFORE, IT IS HEREBY ORDERED that the prayer of the petition of said A. L. May, said trustee in bankruptcy, be and it is hereby granted.

AND IT IS FURTHER ORDERED that the said J. M. Henderson, Jr., and T. J. Scannell, account for and pay over to said A. L. May, said trustee in bankruptcy, within fifteen (15) days from the date of this order, the sum of twelve thousand eight hundred eighty-three and 81/100 (12,883.81) dollars, belonging to the said estate in bankruptcy, and found to be in the possession and under the control of said J. M. Henderson, Jr., and T. J. Scannell.

Dated: June 23d, 1921.

(Signed) S. W. CROSS,
Referee in Bankruptcy.

[Endorsed]: 3843. United States Circuit Court of Appeals for the Ninth Circuit. In Bankruptcy—No. ——. In the Matter of Geo. W. Cowen Co., Inc., Bankrupt. Petition to Revise in Matter of Law. Filed Mar. 17, 1922. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

IN BANKRUPTCY—No. 3843.

In the Matter of GEORGE W. COWEN CO., INC., Bankrupt.

Notice of Filing of Petition to Revise in Matter of Law.

To A. L. May, Trustee in Bankruptcy of the Estate of the Above-named Bankrupt, and to Henry A. Jacobs, H. G. W. Dinkelspiel and G. P. Blanckenburg, His Attorneys:

Please take notice that a petition to revise in matter of law the order made and entered in the Northern Division of the District Court of the United States, for the Northern District of California, First Division, by the Honorable Maurice T. Dooling, Judge thereof, on the 8th day of March, 1922, affirming the order of S. W. Cross, Referee in Bankruptcy of the estate of the above-named bankrupt made on the 23d day of June, 1921, ordering and directing J. M. Henderson, Jr., and T. J. Scannell to pay over unto the said trustee in bankruptcy the sum of twelve thousand eight hundred eighty-three and 81/100 dollars ($12,883.81), was filed on the 17th day of March, 1922, and docketed No. 3843 on the records of said court, a copy of which petition is herewith served; that the record in said cause will be prepared and filed in said court as required by the rules and practice of said

court and that the same mill thereafter be printed and a copy furnished you.

Dated: March 20th, 1922.

ARCHIBALD M. JOHNSON,
A. A. DeLIGNE,
Attorneys for Petitioners, J. M. Henderson, Jr., and T. J. Scannell.

Due service of a copy of the within notice is hereby admitted this 20th day of March, 1922.

HENRY A. JACOBS,
HENRY G. W. DINKELSPIEL,
G. B. BLANCKENBURG,
Attorneys for Trustees.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. In Bankruptcy—No. 3843. In the Matter of George W. Cowen Co., Inc., Bankrupt. Notice of Filing of Petition to Revise in Matter of Law. Filed Apr. 17, 1922. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

IN BANKRUPTCY—No. 3843.

In the Matter of GEORGE W. COWEN CO., INC., Bankrupt.

Stipulation.

IT IS HEREBY STIPULATED that the record which will hereafter be filed in the United States Circuit Court of Appeals for the Ninth Circuit, in the matter of the appeal of J. M. Henderson, Jr.,

and T. J. Scannell from the order made and entered in the Northern Division of the District Court of the United States, for the Northern District of California, First Division, by the Honorable Maurice T. Dooling, on the 8th day of March, 1922, affirming the order of S. W. Cross made on the 23d day of June, 1921, requiring J. M. Henderson, Jr., and T. J. Scannell to pay over to the trustees in bankruptcy in the above-entitled matter the sum of twelve thousand eight hundred eighty-three and 81/100 dollars ($12,883.81), may be used as the record in the above-entitled matter.

Dated: March 20th, 1922.

HENRY A. JACOBS,
HENRY G. W. DINKELSPIEL,
G. B. BLANCKENBURG,
Attorneys for Trustee A. L. May.

ARCHIBALD M. JOHNSON,
A. A. DeLIGNE,
Attorneys for Petitioners.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. In Bankruptcy —No. 3843. In the Matter of George W. Cowen Co., Inc., Bankrupt. Stipulation. Filed Apr. 17, 1922. F. D. Monckton, Clerk.

No. 3843

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. M. HENDERSON, Jr., and T. J. SCANNELL,
Appellants,

vs.

A. L. MAY, as Trustee in Bankruptcy of the Estate of GEO. W. COWEN COMPANY, INC., Bankrupt,
Appellee.

Transcript of Record.

Upon Appeal from the Northern Division of the United States District Court for the Northern District of California.

Names and Addresses of Attorneys of Record.

ARCHIBALD M. JOHNSON and A. A. DeLIGNE, San Francisco, Attorneys for Appellants.

HENRY A. JACOBS and G. B. BLANCKENBURG, San Francisco, Attorneys for Appellee.

In the Northern Division of the District Court of the United States, for the Northern District of California, First Division.

No. 495—IN BANKRUPTCY.

In the Matter of GEO. W. COWEN CO., INC., a Corporation, Bankrupt.

Praecipe and Stipulation in Re Transcript of Record.

To the Clerk of Said Court:

Dear Sir: Please issue and forward to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, the record on Appeal in the above-entitled suit and include therein the following:

1. Petition of Jessie Schulman & Co., a Copartnership, Mack, Kanner & Milans, a copartnership, and C. O. Locke, Assignee of London Strand Dresses, that Geo. W. Cowen Co., Inc., be adjudged a bankrupt. Filed October 12th, 1920.

2. Answer to said petition of Geo. W. Cowen Co., Inc., Filed October 22d, 1920.

3. Order of adjudication of said Geo. W. Cowen Co., Inc., Bankrupt. Filed November 3d, 1920, and

order referring said matter to S. W. Cross. Filed on same date.

4. Petition of A. L. May, Trustee in Bankruptcy, for an order directed to J. M. Henderson, Jr., and T. J. Scannell, directing said Henderson and Scannell to show cause why they should not file an account and pay over the moneys of the bankrupt to the trustee in bankruptcy. Filed with the Referee January 28th, 1921, and Order to show Cause.

5. Answer and response of Henderson and Scannell to above order to show cause.

6. Order of Referee ordering and directing J. M. Henderson, Jr. and T. [1*] J. Scannell to pay over to the trustee in bankruptcy the sum of twelve thousand eight hundred eighty-three and 81/100 ($12,883.81) dollars. Dated June 23d, 1921.

7. Petition of J. M. Henderson, Jr., and T. J. Scannell for a review of the order of the Referee, directing them to pay over twelve thousand eight hundred eighty-three and 81/100 ($12,883.81) Dollars to the trustee in bankruptcy. Filed July 12th, 1921.

8. Certificate of Referee on petition for review of order of Referee, directing Henderson and Scannell to pay over said moneys to the trustee in bankruptcy. Filed September 17th, 1921.

9. Order of District Court, affirming order of the Referee, requiring J. M. Henderson, Jr., and T. J. Scannell to pay over the sum of twelve thousand eight hundred eighty-three and 81/100

*Page-number appearing at foot of page of original certified Transcript of Record.

($12,883.81) dollars to the trustee in bankruptcy. Filed March 9th, 1922.

10. Statement of evidence and proceedings on hearing of petition for order to show cause and answer to petition in respect to payment of said moneys to the trustee in bankruptcy.

11. Assignment of errors. Filed March 16th, 1922.

12. Petition for appeal. Filed March 16th, 1922.

13. Bond on appeal. Filed March 17th, 1922.

14. This praecipe and stipulation.

Dated: August 23d, 1922.

ARCHIBALD M. JOHNSON,
A. A. DeLIGNE,
Solicitors for J. M. Henderson, Jr., and T. J. Scannell. [2]

(Stipulation as to Transcript on Appeal.)

It is hereby stipulated and agreed that the transcript of the record on appeal in the above-entitled suit need include nothing except that which is enumerated in the foregoing praecipe.

Dated: August 23d, 1922.

ARCHIBALD M. JOHNSON,
A. A. DeLIGNE,
Solicitors for Appellant.
HENRY A. JACOBS,
G. B. BLANCKENBURG,
Solicitors for Appellee.

[Endorsed]: Filed at 11 o'clock and —— min. A. M. Sept. 2, 1922. Walter B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [3]

In the Northern Division of the United States District Court for the Northern District of California.

No. (495)—IN BANKRUPTCY.

Creditors' Petition.

In the Matter of GEO. W. COWEN CO., INC., a Corporation, an Alleged Bankrupt.

To the Hon. M. T. DOOLING, Judge of the Northern Division of the District Court of the United States for the Northern District of California:

The petition of Jesse Schulman and Eva Schulman, copartners doing business as Jesse Schulman & Company, Mack Kanner and Arthur Milius, copartners doing business as Mack Kanner and Milius, a copartnership, and Charles O. Lock, assignee of London Strand Dresses, a corporation, respectfully shows:

That during all the times herein mentioned London Strand Dresses was a copartnership, consisting of David J. Levett, Edward Frank and Chester M. Dubois, doing business as London Strand Dresses, having its principal place of business at the City of New York, State of New York.

That during all the times herein mentioned Jesse Schulman and Eva Schulman were and are

copartners doing business under the firm name and style of Jesse Schulman & Company, and having their principal place of business in and at the City of New York, State of New York.

That during all the times herein mentioned Mack Kanner and Arthur Milius were and are copartners doing business under the firm name and style of Mack Kanner and Milius, and having their principal place of business in and at the City of New York, State of New York.

That Geo. W. Cowen Co., Inc., is a moneyed, business or commercial corporation organized under and pursuant to the laws of the State of California, and is not a municipal, railroad, insurance or banking corporation, and is principally engaged in *ladies to wear* and department store, and that it has for the greater portion of six months next preceding the date of the filing of this petition had its principal place of business in and at the [4] City of Sacramento, County of Sacramento, State and District aforesaid, and owes debts to the amount of one thousand ($1,000.00) dollars, and upwards, and is insolvent, and is neither a wage-earner or a person engaged principally in farming or the tillage of the soil;

That your petitioners are creditors of said Geo. W. Cowen Co., Inc., having provable claims against it amounting in the aggregate in excess of securities held by them in the sum of five hundred ($500.00) dollars; that none of your petitioners are entitled to priority of payment of this said claim within the meaning of Section 64 (b) of the

United States Bankruptcy Act and amendments thereof, nor has any of your petitioners received a preference within the meaning of Section 60 (a), (b) of said law as amended.

That the nature and amounts of your petitioners' claims are as follows.

JESSE SCHULMAN & COMPANY: The claim of your petitioner is for: goods, wares and merchandise sold and delivered to said Geo. W. Cowen Co., Inc., a corporation, within two years last past at its special instance and request at the agreed price of five hundred twenty-five dollars and 50/100 ($525.50) dollars, and of which no part thereof has been paid, though duly demanded.

MACK KANNER & MILIUS: The claim of petitioner is for: goods, wares and merchandise sold and delivered to said Geo. W. Cowen Co., Inc., a corporation within two years past at its special instance and request, at the agreed price of one hundred twenty-seven dollars and 50/100 ($127.50) and of which no part thereof has been paid, though duly demanded;

CHARLES O. LOCK: The claim of petitioner is for: goods, wares and merchandise sold and delivered to said Geo. W. Cowen Co., Inc., a corporation by London Strand Dresses, a copartnership, assignor of said Charles O. Lock, within two years last past, at its special instance and request, at the agreed price of one hundred dollars and fifty cents ($100.50) and of which no part thereof has been paid, though duly demanded;

Your petitioner represents that the said Geo. W. Cowen Co., Inc., within four months next preceding the date of the filing of this petition committed an act of bankruptcy in that it did heretofore, to wit: On or about the [5] 15th day of September, A. D. 1920, made an agreement and general assignment for the benefit of its creditors to J. M. Henderson, Jr., and Thomas Scannell, as trustees and assignees for the benefit of the said creditors, and that said trustees and assignees have taken possession of the property of the said George W. Cowen Co., Inc., a corporation under and by virtue of said general agreement and assignment.

WHEREFORE, your petitioners pray that service of this petition with subpoena may be made upon said George W. Cowen Co., Inc., as provided by the Acts of Congress relating to bankruptcy, and that it may be adjudged a bankrupt within the purview of said act.

Dated: This 11th day of October, A. D. 1920.

JESSE SCHULMAN & COMPANY (a Copartnership).

By HENRY G. W. DINKELSPIEL,
Its Attorney.

CHARLES O. LOCK, Assignee of London Strand Dresses, a Copartnership.

By HENRY G. W. DINKELSPIEL,
Its Attorney.

MACK KANNER & MILIUS (a Copartnership).

By HENRY G. W. DINKELSPIEL,
Its Attorney.

HENRY G. W. DINKELSPIEL,
Attorney for Petitioners.,
412 Chronicle Bldg.,
San Francisco, California. [6]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Henry G. W. Dinkelspiel, being first duly sworn, deposes and says:

That he is the attorney for the petitioning creditors mentioned and described in the foregoing petition; that he is authorized to make verification of said petition and makes said verification for and on behalf of said petitioning creditors; that the reason why said petition cannot be verified by said petitioning creditors or either of them, is because said petitioning creditors are absent from the jurisdiction of the above-entitled court, and reside more than one hundred miles from the city and county of San Francisco, where affiant has his office; that affiant makes solemn oath that the statement of facts contained in the foregoing petition are true.

HENRY G. W. DINKELSPIEL.

Subscribed and sworn to before me this 11th October, A. D. 1920.

[Seal] E. C. CONROY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed at 11 o'clock and 10 min. A. M. Oct. 12, 1920. Walter B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [7]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 495—IN BANKRUPTCY.

In the Matter of GEO. W. COWEN CO., INC., an Alleged Bankrupt.

Answer to Creditors' Petition.

Comes now Geo. W. Cowen Co., Inc., a corporation, against which corporation a petition of bankruptcy has been filed, and does hereby enter its appearance in said matter, and answering said petition, admits and avers as follows:

I.

That as to the legal status and capacity to sue of the various petitioning creditors, set forth in said petition, Geo. W. Cowen Co., Inc., has no information sufficient to justify an affirmance or denial of the same.

II.

Admits that Geo. W. Cowen Co., Inc., is a moneyed business or commercial corporation organized under and pursuant to the laws of the State of California, and is not a municipal railroad, insurance, or banking corporation, and is principally engaged in ladies ready-to-wear and department store business, and that it has for the greater portion of six (6) months next preceding the date of filing of said petition had its principal place of business in and at the City of Sacramento, County of Sacramento, State and District aforesaid, and

owes debts to the amount of One Thousand ($1000.00) Dollars, and upwards, and is insolvent, and is neither a wage-earner nor a person engaged principally in farming or tillage of the soil.

III.

Admits that said petitioners are creditors of said corporation, having provable claims against it amounting to more than Five Hundred ($500.00) Dollars, and not entitled to any priority and not having received any preference. [8]

IV.

Admits that on or about the 15th day of September, 1920, said answering corporation made an agreement and general assignment for the benefit of its creditors, as alleged in said petition.

WHEREFORE, said Geo. W. Cowen Co., Inc., a corporation, having answered said petition, submits itself to the jurisdiction of the Court herein, and consents that it be adjudged a Bankrupt within the purview of the Acts of Congress relating to Bankruptcy.

DOWNEY & DOWNEY,
Attorneys for Geo. W. Cowen Co., Inc.

In the United States of America,
Northern District of California,
State of California,
County of Sacramento,—ss.

Sheridan Downey, being duly sworn, deposes and says:

That he is attorney of Geo. W. Cowen Co., Inc., a corporation; that he is authorized to make verification of this Answer and makes said verification

for and on behalf of said Geo. W. Cowen Co., Inc., a corporation; that affiant makes a solemn oath that the statement of facts contained in the foregoing Answer are true.

SHERIDAN DOWNEY.

Subscribed and sworn to before me this 19th day of October, A. D. 1920.

[Seal] JOSEPH S. KNOWLES,
Notary Public in and for the County of Sacramento, State of California.

[Endorsed]: Filed at 3 o'clock and 30 min. P. M. Oct. 22, 1920. Walter B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [9]

In the Northern Division of the United States District Court for the Northern District of California. First Division.

No. 495—IN BANKRUPTCY.

In the Matter of GEO. W. COWEN CO., INC., a Corporation, Involuntary Bankrupt.

(Order of Adjudication Referring Matter to Referee and Designating Newspaper.)

In said District, on the 3d day of November, 1920, before the said Court in Bankruptcy, the petition of Jesse Schulman & Company, a copartnership; Charles O. Lock, assignee of London Strand Dresses, a copartnership, and Mack Kanner & Milius, a copartnership, that Geo. W. Cowen Co., Inc., a corporation, be adjudged bankrupt within

the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, and it appearing to the Court that service of said petition with a writ of subpoena has been duly served on the alleged bankrupt and that the last day upon which pleadings may be filed has expired and no such pleading have been filed by any parties hereto, except consent to adjudication, it is hereby ordered that said Geo. W. Cowen Co., Inc., a corporation, be and hereby is declared and adjudged bankrupt accordingly.

It is thereupon ordered that said matter be referred to S. W. Cross, one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said acts; and that the said Geo. W. Cowen Co., Inc., a corporation, through its proper officers shall attend before said referee on the 15th day of November, 1920, at his office in Sacramento, California, at 10 o'clock forenoon, and thenceforth shall submit to such orders as may be made by said referee or by this Court relating to said matter in bankruptcy.

It is further ordered that all notices required to be published in the above-entitled matter, and all orders which the Court may direct to be published, be inserted in "The Sacramento Bee," a newspaper published in the [10] County of Sacramento, State of California, within the territorial district of this Court, and in the county within which said bankrupt resides.

Dated, November 3d, 1920.

M. T. DOOLING,
District Judge.

[Endorsed]: Filed at 11 o clock and —— min. A. M. Nov. 3, 1920. W. B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [11]

In the District Court of the United States in and for the Northern Division of the Northern District of California.

No. 495—IN BANKRUPTCY.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

Petition for Order Requiring J. M. Henderson, Jr., and Thomas Scannel, Assignees or Trustees Under Assignment for Benefit of Creditors to File Herein Statement of Their Receipts and Disbursements While Acting as Such Assignees or Trustees.

To the Honorable Judge of the Northern Division of the United States District of the Northern District of California, First Division, and to the Referee Thereof:

The petition of A. L. M and W. & J. Sloane, a corporation, respectfully shows:

That your petitioner, A. L. May, was duly and regularly appointed trustee of the assets, property and effects of the above-named bankrupt at a meeting of the creditors of said bankrupt held at the

office of S. W. Cross, Esq., referee in bankruptcy, at the City of Sacramento, County of Sacramento, Northern District of California (Fred A. Copestake, Referee in Bankruptcy presiding), on the 15th day of December, 1920; that thereafter and on the 16th day of December, 1920, said A. L. May qualified as such trustee by filing a bond in the sum of one thousand (1,000) dollars, which said bond was then and there approved, and said A. L. May has ever since said 16th day of December, 1920, been and now is the duly appointed, qualified and acting trustee of the assets, property and effects of the above-named bankrupt. [12]

That your petitioner, W. J. Sloane, is a corporation organized and doing business under and by virtue of the laws of the State of New York, and having a place of business in San Francisco, California, and is a creditor of said bankrupt for the sum of eleven hundred (1100) dollars, and has made and filed its proof of debt for that amount herein.

That on the 15th day of September, 1920, the above-named bankrupt entered into an agreement in writing with one J. M. Henderson, Jr., and Thomas Scannel, both of the City of Sacramento, County of Sacramento, State of California, wherein and whereby said Geo. W. Cowen Co., Inc., a corporation, the above-named bankrupt, conveyed, transferred and set over unto said J. M. Henderson, Jr., and Thomas Scannel, all the right, title and interest of the said company, said bankrupt, in and to its assets of every nature and description,

including the merchandise owned by the said bankrupt, its accounts receivable, its cash in bank, the fixtures of its place of business, and all other property of every kind in anywise relating to its business, in trust, nevertheless, and upon the agreement by said J. M. Henderson, Jr., and Thomas Scannel to act as trustees to the best of their ability to the end that the creditors of said bankrupt should be paid their respective indebtedness in full during the life of the trust and as soon as the business conducted by the said trustees should warrant the payment thereof; that said J. M. Henderson, Jr., and Thomas Scannell accepted said trust created by said agreement hereinbefore referred to, and on or about said 15th day of September, 1920, entered into and took possession as such trustees or assignees of all of the assets of the above-named bankrupt, including [13] stock of merchandise, consisting of ladies' cloaks, suits, dresses and ready-to-wear specialties and the like, as is more particularly set forth and referred to in the inventory of the receiver on file in the above-entitled matter, as well as the leasehold occupied by the above-named bankrupt at No. 806–8 K Street, Sacramento, California, trade fixtures contained in the business premises of said bankrupt, accounts receivable, cash in bank, and all other property of every kind in anywise relating to the business of the above-named bankrupt, the value of which is unknown to your petitioners, but which your petitioners aver amounted to approximately seventy-five thousand (75,000) dollars;

that said J. M. Henderson, Jr., and Thomas Scannel, as such trustees or assignees of the property conveyed, transferred and set over unto them by the above-named bankrupt, as aforesaid, remained continuously in possession of said assets, property and effects from and after the 15th day of September, 1920, the date upon which they took possession thereof, as hereinbefore set forth, and conducted the business connected therewith with the full knowledge and acquiescence of the creditors of said bankrupt, up to and until the 4th day of November, 1920, at which time J. M. Henderson, Jr., by an order made by the referee to whom the above-entitled matter had been referred by order of the above-entitled court, was appointed and qualified as receiver in the above-entitled proceeding, and upon which said date said J. M. Henderson, Jr., as said receiver, took over the said assets, property and affects from J. M. Henderson, Jr., and Thomas Scannel as such trustees or assignees.

That between the said 15th day of September, 1920, and said 4th day of November, 1920, and during the period intervening between said dates, and while said J. M. Henderson, Jr. and Thomas Scannel were acting as trustees or assignees, as aforesaid, [14] they, the said J. M. Henderson, Jr., and Thomas Scannel, conducted the said business as hereinbefore set forth, and received during such conduct large sums of moneys belonging to the estate of the above-named bankrupt, which they did not pay over in whole or in part to the receiver, and have not paid over in whole or in

part to the trustee, petitioner herein, and for which they the said J. M. Henderson, Jr., and Thomas Scannel, as such trustees or assignees, have not accounted either in whole or in part to either said receiver, said trustee or to the above-entitled court.

That your petitioners are informed and believe, and therefore allege the fact to be, that the amount of money so received by said J. M. Henderson, Jr., and Thomas Scannel, as such trustees or assignees, exceeds the sum of twelve thousand (12,000) dollars; that said J. M. Henderson, Jr., and Thomas Scannel, and each of them, have ever since the appointment and qualification of said A. L. May, your petitioner herein as trustee, refused and now refuse to pay over said money, or any part thereof, or to account for any part thereof, to said A. L. May, trustee in bankruptcy, and one of the petitioners herein, or to this Court.

That the order of adjudication made by the above-entitled Court, whereby the said Geo. W. Cowen Co., Inc., was adjudged a bankrupt, was based upon an involuntary petition in bankruptcy filed herein on the 11th day of October, 1920, by certain creditors of the above-named bankrupt, which said petition prayed for the adjudication of said bankrupt exclusively upon the following grounds:

> "Your petitioner represents that said Geo. W. Cowen Co., Inc., within four months next preceding the date of the filing of this petition, committed an act of bankruptcy in that it did heretofore, to wit, on or about the 15th day

of September, 1920, make an agreement and general assignment for the benefit of its creditors to J. M. Henderson, Jr., and Thomas Scannell as [15] trustees and assignees for the benefit of the said creditors, and that said trustees and assignees have taken possession of the property of the said Geo. W. Cowen Co., Inc., a corporation, under and by virtue of said general agreement and assignment."

WHEREFORE, your petitioners pray that said J. M. Henderson, Jr., and Thomas Scannel, and each of them, be required by an order of this Court to file an itemized and detailed statement showing their assets and disbursements of money and other assets under said assignment for the benefit of creditors for the period from the 15th day of September, 1920, up to the 4th day of November, 1920, and until the receiver of the above-named bankrupt took charge, and to pay and deliver over to your petitioner, A. L. May, trustee in bankruptcy herein, all moneys and properties coming into their hands as assignees or trustees under said assignment for the benefit of creditors made to them by the said bankrupt on or about the 15th day of September, 1920, as herein set forth, and your petitioners pray for such other and further

relief as may be meet and proper in the premises.

A. L. MAY,
Trustee in Bankruptcy Herein, Petitioner.
W. & J. SLOANE,
Petitioner Herein.
By F. O. COOKE,
Director.

HENRY A. JACOBS,
G. B. BLANCKENBURG,
Attorney for Petitioner, A. L. May, Trustee.
JOSEPH KIRK,
Attorney for W. & J. Sloane, Petitioner. [16]

State of California,
City and County of San Francisco,—ss.

A. L. May, being first duly sworn, deposes and says:

That he is the duly appointed, qualified and acting trustee of Geo. W. Cowen Co., Inc., the above-named bankrupt, and one of the petitioners named in the foregoing petition; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

A. L. MAY.

Subscribed and sworn to before me this 26th day of January, 1921.

[Seal] H. B. BENSON,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed January 28, 1921, at 9 o'clock and 20 minutes A. M. S. W. Cross, Referee in Bankruptcy. [17]

In the District Court of the United States, in and for the Northern Division of the Northern District of California.

No. 495—IN BANKRUPTCY.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

Answer and Response of J. M. Henderson, Jr., and Thomas Scannel to Order to Show Cause Dated January 28, 1921.

Now comes J. M. Henderson, Jr., and Thomas Scannel in response to the order to show cause directed to them by the Hon. S. W. Cross, referee in bankruptcy, in the above-entitled matter, dated January 28, 1921, and show as follows:

That on or about the 15th day of September, 1921, an agreement dated as of said day, between Geo. W. Cowen Co., Inc., as party of the first part, J. M. Henderson, Jr., and Thomas Scannel, as parties of the second part, and the creditors of Geo. W. Cowen Co., Inc., as parties of the third part, was prepared, wherein and whereby the said Geo. W. Cowen Co., Inc., and the creditors of said Geo. W. Cowen Co., Inc., purported to grant and confer upon said Henderson and Scannel a trusteeship in connection with all the assets and property of said Geo. W. Cowen Co., Inc., and said Hender-

son and Scannel agreed to act as trustees thereunder.

That these respondents have not any of the originals of said agreement but are informed and believe that Geo. W. Cowen, as an officer of said Geo. W. Cowen [18] Co., Inc., has an original of said agreement, and they ask that the same be caused to be produced and the contents of the same be deemed to be incorporated herein, and to form a part of this answer and showing.

That it was intended, understood and agreed between said Geo. W. Cowen Co., Inc., and these respondents that said agreement should become effective and in force only in case the creditors of said Geo. W. Cowen Co., Inc., and particularly certain large creditors of said corporation resident in the State of New York, should sign and assent to said agreement.

That upon the aforesaid condition and understanding and agreement that said agreement should be effective and in force only in case the creditors, and particularly the creditors of said corporation resident in New York, should sign the same, the said Geo. W. Cowen Co., Inc., and these respondents signed several originals of said agreement and the same were placed in the hands of Geo. W. Cowen and the representatives of certain New York creditors to procure the signatures thereto of creditors of said corporation; that prior to the signing of said agreement by said corporation and these respondents, the respondent Scannel had occupied the position of manager of the business

of said Geo. W. Cowen Co., Inc., subject to the orders and control of the board of directors of said corporation and of Geo. W. Cowen, its chief executive officer.

That said agreement was never signed or assented to by the said New York creditors, nor by many other creditors, but on the contrary said New York Creditors and other creditors composing or representing a large percentage of the indebtedness of said corporation refused to sign or [19] assent to said agreement and the same never became effective or in force as a binding agreement or conveyance.

That at all times from the time said agreement was signed and until the institution of these proceedings in bankruptcy the respondent Henderson refused to act as or assume any responsibility or trust under said agreement until the same should be signed by the creditors of said G. W. Cowen Co., Inc., and particularly by the said New York creditors, and expressly so stated on divers occasions during said period of time, to the respondent Scannel and to officers of said Geo. W. Cowen Co., Inc.

That the respondent Henderson at no time assumed any duties or responsibilities or trusts under said agreement, but that he was on divers occasions consulted by said Geo. W. Cowen and said Scannel and advised with them more or less on the conduct of the business of said company pending efforts by said Cowen to secure the execution of said agreement by the said creditors but at all times maintained that neither he nor

said Scannel would have any right or authority under or by virtue of said agreement until the same should be executed by the creditors of said corporation and at no time exercised any such right or authority; that during said period, after the signing of said agreement, and while the respondent Scannel was managing the business of said Geo. W. Cowen Co., Inc., as more fully hereafter stated, said Geo. W. Cowen demanded of said Scannel that he reduce the number of employees in the conduct thereof; that said Scannel and said Cowen consulted with said Henderson in respect thereto and the said Henderson advised said [20] Scannel that as the trusteeship was not in force he, said Scannel, was bound to follow the instructions of said Cowen; that in consonance with said advice said Scannel dispensed with the services of a number of employees of said company, including the brother and brother-in-law of said Geo. W. Cowen; that upon the following day said Geo. W. Cowen revoked the order of said Scannel in respect to his said brother and brother-in-law and reinstated them in such employment.

That after the signing of said agreement by said Geo. W. Cowen Co., Inc., and by Henderson and Scannel, said Scannel continued to manage the business of said company until the appointment of said Henderson as receiver in these proceedings on November 4, 1920; that during said period and until bankruptcy proceedings were instituted against said corporation it was believed by said Scannel, said Henderson and the officers of said

corporation that said agreement would be signed by the creditors of the corporation and that said agreement would in due time become effective and in full force and that thereupon, to wit: when said agreement should become effective by the execution thereof by said creditors, title to all of the assets and business of said corporation would vest in said trustees under the trusts provided in said agreement; that said Scannel so continued to manage said business with the consent of said corporation, subject, however, to his understanding and advice that said Geo. W. Cowen as the chief executive officer of said corporation, could, if he so desired, control his; said Scannel's authority in the premises, but with the belief and understanding on his part that his [21] management and conduct of said business was to protect and promote the business of the said Cowen Company for the ultimate benefit of said trusteeship, which said Scannel and said corporation understood and believed would shortly follow; that said business was conducted by said Scannel with the expectation that such trusteeship would ensue, and in some respects as if said trusteeship provisionally were in effect, but with the distinct understanding that said Henderson refused to be or act as trustee until said agreement should be executed by said creditors and with the further understanding that until said agreement was so executed by the creditors of said Cowen Company he was subject to the orders of said corporation.

That ever since the opening of the business of said Geo. W. Cowen Co., Inc., it had done its bank-

ing business with the Fort Sutter National Bank, where it deposited moneys almost daily and likewise almost daily checked against its account in said bank; that such was the practice when said agreement of September 15, 1920, was signed; that said Scannel, both before and after the 15th day of September, 1920, continued to bank at said Fort Sutter National Bank, maintained an open or general account at said bank and deposited moneys in said bank almost daily; that no change in this practice was at any time made by said Scannel after the 15th day of September, 1920, and between the 15th day of September, 1920, and the 4th day of November, 1920, he deposited in said bank, on different days running through the entirety of said period, an aggregate of about $22671.58 of moneys belonging to said Geo. W. Cowen & Co., Inc., and withdrew on checks to pay [22] the current expenses of said business the sum of $9787.77; that said deposits were made on general or open account and were not made as payments of or on account of any indebtedness of said Geo. W. Cowen Co., Inc., to said bank, or with any intention to in any manner prefer said bank or to enable it to apply said moneys or any thereof to any indebtedness which said bank might hold against said corporation, but solely and alone with the intention and purpose of maintaining a checking account in order to conduct the business of the corporation in the usual manner; that no part of said deposits were made in said bank by said Scannel at the direction, suggestion or advice of said Henderson,

or of any other person, nor was any such direction, suggestion or advice ever given or attempted by said bank or said Henderson, or any other person, but they were made in the usual course of business with the knowledge of the officials of said Geo. W. Cowen Co., Inc., and without any thought on the part of said Scannell of preferring said bank or of enabling it to share in the estate of said Geo. W. Cowen Co., Inc., to a greater extent than any other creditor in the same class.

The said Fort Sutter National Bank of Sacramento and its successor in interest, the Sacramento-San Joaquin Bank, now hold the sum of $12,883.81 of the deposits so made by said Scannell in said Fort Sutter National Bank between the 15th day of September, 1920, and the 4th day of November, 1920, and claim said sum of $12,883.81 as a partial setoff to a note of said Geo. W. Cowen Co., Inc., to said bank dated January 9, 1920, for the principal sum of $15,000. [23]

That said claim or setoff by said bank and the right to withhold and apply said moneys to said note are made by said bank and its successor, Sacramento-San Joaquin Bank, in good faith and these respondents are without legal right or power to demand or retake said moneys for the benefit of the estate of said Geo. W. Cowen Co., Inc., and it is respectfully submitted that this court is without jurisdiction, under the circumstance aforestated, to summarily require the respondents or either of them to pay said moneys or any thereof to the trustee herein.

The respondent Scannell further shows that the balance of the funds deposited by him with said bank and drawn out on his checks, were used to pay current legitimate expenses of said Geo. W. Cowen Co., Inc., and none of the same was used to prefer any creditor or creditors of said corporation. He further offers to give an account of all payments if it is so desired.

WHEREFORE these respondents pray that the petitioners take nothing by reason of their said petition and that these respondents and each of them be hence dismissed with their costs and such other and further or different relief as may be proper.

Dated: February 14th, 1921.

J. M. HENDERSON, Jr.,
T. J. SCANNELL,
Respondents. [24]

State of California,
County of Sacramento,—ss.

J. M. Henderson, Jr., and Thomas Scannell, being duly sworn, each for himself says:

That he has read the foregoing answer and response in the order to show cause referred to therein and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on his information and belief, and as to those matters he believes it to be true.

J. M. HENDERSON, Jr.
T. J. SCANNELL.

Subscribed and sworn to before me this 14th day of February, 1921.

[Seal] RALPH W. ECKHARDT,
Notary Public in and for the County of Sacramento, State of California. [25]

In the District Court of the United States, in and for the Northern Division of the Northern District of California.

No. 495—IN BANKRUPTCY.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

Stipulation (That Copy of Answer may be Filed in Place of the Original).

IT IS HEREBY STIPULATED and agreed that the foregoing and annexed is a true and correct copy of the answer and response of J. M. Henderson, Jr., and Thomas Scannell to order to show cause, dated January 28th, 1921, in the matter of Geo. W. Cowen Co., Inc., Bankrupt, Number 495, in Bankruptcy—in the District Court of the United States, in and for the Northern Division of the Northern District of California; and

IT IS FURTHER STIPULATED that said copy of said answer and response may be filed in the place of, and as and for the original of said answer and response in view of the fact that the clerk of said court is unable to find the original thereof.

Dated September 15th, 1922.

ARCHIBALD M. JOHNSON and
A. A. DeLIGNE,
Attorneys for J. M. Henderson, Jr., and Thomas Scannell.

HENRY A. JACOBS,
HENRY G. W. DINKELSPIEL,
G. B. BLANCKENBURG,
Attorneys for A. L. May, Trustee.

The foregoing stipulation is approved.

Dated: September 16th, 1922.

M. T. DOOLING,
Judge.

[Endorsed]: Filed at 1 o'clock and 50 min. P. M. Sep. 16, 1922. W. B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [26]

In the District Court of the United States in and for the Northern Division of the Northern District of California.

No. 495—IN BANKRUPTCY.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

Order Directing J. M. Henderson, Jr., and T. J. Scannell to Pay Over to A. L. May, Trustee in Bankruptcy, the Sum of $12,883.81, Belonging to the Estate of the Above-named Bankrupt.

The application of A. L. May, trustee in bankruptcy of Geo. W. Cowen Co., Inc., bankrupt, for

an order requiring J. M. Henderson, Jr., and T. J. Scannell, to account and pay over to said A. L. May, said trustee in bankruptcy, proceeds of certain property belonging to said estate, alleged to be in the possession and under the control of said J. M. Henderson, Jr., and T. J. Scannell, coming on regularly for hearing before me as referee, upon the verified petition of said A. L. May, trustee in bankruptcy, as aforesaid, and the verified answer of said J. M. Henderson, Jr., and T. J. Scannell, said A. L. May, as trustee in bankruptcy, being represented by Henry A. Jacobs, Esq., his attorney, and J. M. Henderson, Jr., and T. J. Scannell being represented by A. A. DeLigne, Esq., their attorneys; and evidence, oral and documentary, having been introduced, and the matter having been duly heard and testimony taken, and the matter having been submitted and briefs filed.

And it appearing that said J. M. Henderson, Jr., and T. J. Scannell having in their possession and under their [27] control the sum of twelve thousand eight hundred and eighty-three and 81/100 (12,883.81) dollars belonging to said bankrupt estate.

NOW, THEREFORE, IT IS HEREBY ORDERED that the prayer of the petition of said A. L. May, said trustee in bankruptcy, be and it is hereby granted.

AND IT IS FURTHER ORDERED that the said J. M. Henderson, Jr., and T. J. Scannell, account for and pay over to said A. L. May, said trustee in bankruptcy, within fifteen (15) days

from the date of this order, the sum of twelve thousand eight hundred eighty-three and 81/100 (12,883.81) dollars, belonging to the said estate in bankruptcy, and found to be in the possession and under the control of said J. M. Henderson, Jr., and T. J. Scannel.

Dated: June 23, 1921.

S. W. CROSS,
Referee in Bankruptcy.

[Endorsed]: Filed June 23, 1921, at 3 o'clock and 20 minutes P. M. S. W. Cross, Referee in Bankruptcy. [28]

In the District Court of the United States in and for the Northern Division of the Northern District of California.

No. 495—IN BANKRUPTCY.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

Petition for Review of Order of Referee Directing J. M. Henderson, Jr., and T. J. Scannell to Pay Over to A. L. May, Trustee in Bankruptcy, the Sum of $12,883.81.

To S. W. Cross, Referee in Bankruptcy.

Your petitioners respectfully show that in the course of the proceedings in the above-entitled matter on the 23d day of June, 1921, an order, a copy of which is hereto annexed, was made and entered herein. That such order was and is erroneous in that

1. This Court was without jurisdiction to make said order, it being averred and claimed in the answer of said respondents, Henderson and Scannell, to the petition for an order to show cause; and it appearing from the evidence introduced and received, that said moneys, to wit: Said sum of twelve thousand eight hundred eighty-three and 81/100 dollars ($12,883.81) was at all times mentioned in said petition, and order to show cause and ever since has been held and claimed as its own, by the Fort Sutter National Bank and the Sacramento-San Joaquin Bank, its successor in interest, in good faith; and that this Court has not jurisdiction to pass upon or determine the legality of the claim of said Fort Sutter [29] National Bank and the Sacramento-San Joaquin Bank, its successor in interest, thereto.

2. The evidence shows that the moneys referred to in the order sought to be reviewed, never came into the possession or the control of the respondent Henderson, and that said moneys were deposited by the agents or employees of the said bankrupt in said Fort Sutter National Bank in the regular course of business, and without any intention to prefer said Fort Sutter National Bank over any other creditor or creditors of said George W. Cowen Co., Inc.

And that the said Fort Sutter National Bank and said Sacramento-San Joaquin Bank, as its successor in interest, claim and are entitled to said moneys as an offset on indebtedness of said George W. Cowen Co., Inc., to said Fort Sutter

National Bank and said Sacramento-San Joaquin Bank, its successor in interest.

WHEREFORE your petitioners feeling aggrieved because of such order, pray the same may be reviewed as provided in the Bankruptcy Act of 1898, and in general order XXVII.

Dated: June 30th, 1921.

J. M. HENDERSON, Jr.,
T. J. SCANNELL,
By A. A. DeLIGNE, Atty.,
Petitioners.

State of California,
County of Sacramento,—ss.

J. M. Henderson, Jr., being first duly sworn, deposes and says that he is one of the petitioners in the foregoing petition.

That the other petitioner, T. J. Scannell, is without the State of California and for that reason is unable to join in this verification. [30]

That affiant makes this affidavit on behalf of himself and said T. J. Scannell.

That affiant has read the foregoing petition and knows the contents thereof.

That he verily believes that the same is in all respects true and that the same is made and filed in good faith.

J. M. HENDERSON, Jr.

Subscribed and sworn to before me this 30th day of June, 1921.

[Seal] F. J. OEHLER,
Notary Public in and for the City of Sacramento, State of California.

[Endorsed]: Filed July 1st, 1921, at 10 o'clock and 20 minutes A. M. S. W. Cross, Referee in Bankruptcy. [31]

In the District Court of the United States in and for the Northern Division of the Northern District of California.

No. 495—IN BANKRUPTCY.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

Before S. W. CROSS, Referee in Bankruptcy.

Certificate of Referee on Petition for Review.

To the Honorable the Judges of the District Court of the United States in and for the Northern Division of the Northern District of California:

The undersigned Referee in Bankruptcy, in charge of this proceeding, respectfully certifies and reports:

A petition was filed by A. L. May, trustee in bankruptcy, asking for a summary order requiring J. M. Henderson, Jr., and T. J. Scannell to pay over to said trustee certain moneys which had come into their hands and which the trustee in bankruptcy claimed were illegally withheld by these parties without any right or claim thereto. An answer was filed by the respondents denying the charge of the trustee in bankruptcy and alleging that the respondents had no funds on hand belonging to the bankrupt estate, but admitting that funds aggregating twelve thousand eight hundred

eighty-three and 81/100 (12,883.81) dollars had been deposited with the Fort Sutter National Bank, which said funds were applied by said bank on a promissory note due them from said bankrupt, and which it is claimed the bank had a right to apply under the provisions of the banker's lien [32] act of the State of California. It is further contended on behalf of the respondents that the trustee in bankruptcy, in order to reach these funds, must proceed by way of a plenary suit brought against the Fort Sutter National Bank.

On the several hearings of the above-entitled matter before me, S. W. Cross, Referee in Bankruptcy, A. A. DeLigne, Esq., appeared for the Respondents, and Henry A. Jacobs, Esq., appeared for the trustee in bankruptcy.

On the 23d day of June, 1921, the Referee made an order, a copy of which is transmitted herewith, granting the petition of A. L. May, trustee of the above-named bankrupt, and requiring J. M. Henderson, Jr., and T. J. Scannell to account for and pay over to said A. L. May, trustee in bankruptcy, the sum of $12,833.81 belonging to the said estate in bankruptcy and found to be in the possession and under the control of said J. M. Henderson, Jr., and T. J. Scannell. Said J. M. Henderson, Jr., and T. J. Scannell, feeling aggrieved thereat, on June 30, 1921, filed herein a petition for a review of said order, which petition is hereto attached.

The question presented for review is whether J. M. Henderson, Jr., and T. J. Scannell have in

their possession the said sum of $12,883.81 belonging to the estate of said bankrupt.

The following is a summary of the evidence. A transcript of the evidence and proceedings is transmitted herewith.

The Geo. W. Cowen Co., the above-named bankrupt, for some time prior to the filing of the petition in bankruptcy, had conducted a ladies' ready-to-wear department store in the City of Sacramento, State of California, the Company being a corporation under the direct management of [33] its president, Geo. W. Cowen, who at all times was the owner of and in control of almost the entire capital stock of this company. During its business career the company had an account with the Fort Sutter National Bank of Sacramento, and for some time prior to the filing of the petition was indebted to this bank in the sum of $15,000, which amount was evidenced by a promissory note executed by the company in favor of the bank. The affairs of the company having become involved, and Mr. Cowen, after a trip East in an endeavor to raise funds, having found it impossible to continue business, had a conference with a number of his creditors, including the Fort Sutter National Bank, which at all times was represented by its president, J. M. Henderson, Jr., one of the respondents herein. The testimony of Mr. Geo. W. Cowen shows that about two weeks prior to September 15, 1920, he had a conference with Mr. J. M. Henderson, Jr., in an endeavor to raise funds to continue the business.

"The purpose of the trusteeship was taken up with Mr. Henderson, of the Sacramento Bank, possibly a week or two weeks before September 15th, with the understanding to be refinanced, the corporation; the main purpose of signing this agreement was to obtain approximately twenty-five thousand dollars in cash from Mr. Henderson, and of course with the proviso that the creditors would set aside their claims for a period of one or two or three years, so that the business could have new capital, and would be refinanced, new purchases being made, and so forth. That was discussed at length about two weeks before September 15, with the understanding that we would be refinanced, and that Mr. Scannell and Mr. Henderson was to be the trustees. At the time of the meeting of September 15th, there was only about possibly half an hour wasted in signing the agreement, as it was all understood to be signed. The meeting following that time was held on September 22d, where we had a discussion with regard to the management of the business, after the trustee's agreement was in effect, and after Mr. Wiener returned to New York City." [34]

(Testimony of Geo. W. Cowen, Reporter's Transcript, p. 177, lines 11–28.)

This testimony is corroborated by that of Mr. J. M. Henderson, Jr., who, upon being called in his own defense admitted, that there had been a number of conferences, and that prior to Septem-

ber 15th, 1920, he had agreed to act as trustee. The testimony also shows that Mr. Henderson was the president of the Fort Sutter National Bank and of the Sacramento-San Joaquin Bank, with which it merged later on.

(See Reporter's Transcript, Wednesday March 30th, 1921, testimony of J. M. Henderson, Jr., pp. 2–4.)

As a result of the numerous conferences an agreement of trusteeship was drawn up and executed by the Geo. W. Cowen Co., J. M. Henderson, Jr., and T. J. Scannell as trustees, and by a number of creditors. The agreement was acknowledged by S. H. Jones, Notary Public.

(See Trustee's Exhibit No. 19.)

Immediately following the execution of this agreement Mr. T. J. Scannell, who had been an employee of the Cowen Co., receiving his instructions from Mr. Geo. W. Cowen, was placed in full charge of the business, and the authority of Mr. Geo. W. Cowen consequently revoked.

(See Reporter's Transcript, Monday Feb. 14th, 1921, p. 46, lines 26–32; p. 47, lines 1–16; also see testimony of Geo. W. Cowen, Reporter's Transcript Mar. 8th, 1921, pp. 179–182.)

This testimony further shows that on September 15th, 1920, immediately after the agreement was signed, Mr. Scannell was placed in charge of the business at the request of the different parties who executed the agreement, and that after that date the authority of Mr. Geo. W. Cowen ceased and

that he was not consulted in the matter of the conduct [35] of the business. In fact, on one occasion, Mr. Cowen went to see Mr. Henderson to complain about the discharge of Mr. Cowen's brother, who it appears had been discharged by Mr. Scannell. Mr. Cowen testified that he was very mad about it but was informed by Mr. Henderson "that Mr. Scannell is in charge of the place, and anything he said, why, would go, and that was the end of that."

(See Reporter's Transcript, Tuesday, March 8th, 1921, p. 181, lines 5–6.)

Mr. Cowen further testified that from and after September 15th, 1920, Mr. Scannell was taking direct instructions from Mr. Henderson and Mr. Henderson only.

Again, on September 22d, 1920, one week after the trust agreement was entered into, a meeting of the interested parties was held in the office of the Geo. W. Cowen Co., a record of which meeting was made by Mr. Fred Cowen, who at that time was an employee of the Cowen Co. This record was made at the request of Mr. J. M. Henderson, Jr., and was called a record of the trustees' proceedings. A meeting was likewise held on September 24th, 1920, and a similar record was made by Mr. Fred Cowen.

(See Trustee's Exhibit No. 22; see also Reporter's Transcript, March 18th, 1921, pp. 43–44.)

The records of the meeting of September 24, 1920, show that it was agreed by all the parties

present, including Mr. J. M. Henderson, Jr., and T. J. Scannell, the trustees under the agreement, that the bank account should be changed from that of the Geo. W. Cowen Co. to that of J. M. Henderson, Jr., and T. J. Scannell, Trustees. Accordingly, on September 24th, 1920, the signature of Geo. W. Cowen was cancelled at the Fort Sutter National Bank and [36] the account of Geo. W. Cowen Co. closed. At that time there was a balance of $2,030.90 to the credit of the Geo. W. Cowen Co. in bank, for which a check was drawn payable to the order of "Trustees Geo. W. Cowen, Inc., Sacramento" and signed:

"Geo. W. Cowen Co., Inc.,
T. J. Scannell,
Trustee."

This check and also all other funds that were received from the conduct of the business of the Geo. W. Cowen Co. were thereafter from said 24th day of September, 1920, deposited in the Fort Sutter National Bank in a different account known and designated as

"J. M. Henderson, Jr., and T. J. Scannell,
Trustees."

(See testimony of John Locketti, Reporter's Transcript, Thursday, Feb. 24th, 1921, pp. 108–9.)

The account in the Fort Sutter National Bank from and after that date was under the control absolutely of J. M. Henderson, Jr., who at all times was intimately advised and informed of the various transactions relating to the account.

Various officers of the bank were called upon to testify, all of whom stated that they had no actual handling of this account, and none of them could explain the reason for the change.

Mr. H. H. Robinson, who was assistant cashier of the bank, testified that various debits were made against this account as follows:

Sept.	30,	1920	$4516.43
Oct.	13,	"	5007.26
Oct.	15,	"	173.18
Oct.	16,	"	518.03
Oct.	19,	"	738.25
Oct.	25,	"	1508.16

[37]

(See Trustee's Exhibits Nos. 8, 9, 10, 11, 12 & 13.)

These debits were made to pay the indebtedness due the bank upon the $15,000 note owing from the Geo. W. Cowen Co. and which debits were made under direct instructions given by Mr. J. M. Henderson, Jr., to Mr. Robinson to exercise his banker's lien against the fund as fast as the money came in. This is admitted to be correct by Mr. Henderson, whose testimony in that regard given on cross-examination is as follows:

"Q. The first debit item appears about September thirtieth, I think that is correct, and, as I understand Mr. Robinson's testimony, it was at that time that you instructed him to debit the account? A. Yes.

Q. Mr. Robinson also stated your instruc-

tions were to continue the debit account as fast as the money came in; is that correct?

A. Yes, sir."

(See Reporter's Transcript, Wednesday, March 30th, 1921, p. 7, lines 14–19.)

It also appears that the different officers in charge of the bank under Mr. Henderson discussed the right of the bank to exercise the so-called banker's lien.

The control of J. M. Henderson, Jr., over the business of the Cowen Co. after September 15, 1920, is very clearly shown by the following testimony of A. Grace Cowen:

"I went to Mr. Scannell. It was understood, when Mr. Henderson and Mr. Scannell became trustees, that they were to retain my services and pay me a salary that, in my mind, I thought would be reasonable. I stated, at the time, that I had been receiving four hundred dollars, and I expected the same salary, that is, four hundred dollars a month; so, after I had been in the service there, selling on the second floor, about a month, I went to Mr. Scannell and asked him if he would pay my salary, and he said that he couldn't pay it,—he had nothing to do with that, I would have to see Mr. Henderson. I phoned, I believe, three or [38] four times to Mr. Henderson, and he said, why, he didn't know anything about it; so then I went back to Mr. Scannell, and he said: 'Well, I have talked to Mr. Henderson, several times, and I can't get any

headway with him at all'; so I, personally, went down to see Mr. Henderson, myself, but he said: 'Mrs. Cowen, you have Mr. Cowen draw out a check for two hundred,—not over that amount'; and I said to Mr. Henderson at that time 'Well, that is not the salary that I was supposed to get; I was supposed to draw four hundred dollars a month'; and he said 'Well, that is all we think that we can pay you, now,' and I said: 'Well, you know, Mr. Henderson, that Mr. Cowen isn't signing checks, and will that check be honored?' and he said 'I will see that it is honored.' I came back and reported to Mr. Scannell, and I asked Mr. Scannell if he didn't think that was quite unusual, and he said yes, but he said evidently Mr. Henderson had some purpose in doing so. I went to Mr. Kennerly. Mr. Kennerly made out the check, and Mr. Cowen signed it, and I went to the bank and stood in line there, and I don't know which one of the paying paying tellers it was, but he got the check and started to examine the signature card, and was about to turn it back, when Mr. Mayhood spoke up and said that, 'You can honor the check.' "

(See Reporter's transcript, Tuesday, March 8th, 1921, p. 161, line 10, to page 162, line 7.)

The check referred to by Mrs. Cowen is a check for $250, drawn October 22d, 1921, in her favor, and signed by Geo. W. Cowen, and was the only

check drawn by Geo. W. Cowen and honored by the bank after September 24th, 1921.

(See Trustee's Exhibit No. 21.)

The original ledger sheet of the bank showing the account to have been opened on September 24th, 1920, in the names of J. M. Henderson, Jr., and T. J. Scannell, Trustees, Geo. W. Cowen Co., was destroyed by the officials of the bank some time after the filing of the petition in bankruptcy. This was done under the express direction of Mr. J. M. Henderson, Jr., who so admitted.

(See Reporter's Transcript, Feb. 24th, 1921, p. 108, lines 30–32.)

An attempt was made to restore this account to the Geo. W. Cowen Co. by rewriting these ledger sheets showing a [39] continuation of the old account.

(See testimony of John Locketti, Reporter's Transcript, Thursday, Feb. 24, 1921, pp. 108–9.)

The petition in bankruptcy was filed on October 9th, 1920, and notwithstanding the filing of this petition J. M. Henderson, Jr., and T. J. Scannell, acting at all times under the direct instructions of Mr. Henderson, continued to deposit the funds obtained from the business operated by Mr. Henderson and himself, in the bank owned and controlled principally by Mr. Henderson, who now attempts to offset his bank's account by exercising a so-called banker's lien.

It is noted that of the $12,883.81, the sum of $4,516.43 was applied on September 30th, 1920, leav-

ing a balance of $8367.38, which was transferred in payment of the bank's note after the filing of the petition in bankruptcy.

It is a well-settled principle of law that "the filing of the petition is a *caveat* to all the world, and in effect an attachment and injunction."

See,

Muller vs. Nugent, 7 A. B. R. 224.

Also,

Michaelis vs. Lindeman, 27 A. B. R. 229.

R. & W. Skirt Co., 34 A. B. R. 353.

Lazarus vs. Prentice, 32 A. B. R. 559.

Steinhardt vs. National Park Bank, 18 A. B. R. 86.

Reed vs. Barnett National Bank, 41 A. B. R. 419.

Referring to the debit of $4,516.43, transferred by the bank on September 30, 1920, for the purpose of reducing the amount of the note of the Geo. W. Cowen Co., the testimony conclusively [40] shows that both Mr. J. M. Henderson, Jr., and the Fort Sutter National Bank had actual knowledge of the insolvent condition of the Geo. W. Cowen Co.; that they had entered into a trust agreement; that this agreement was executed both by Mr. J. M. Henderson, Jr., as trustee, and by the Fort Sutter National Bank, a creditor in the sum of $15,000, by G. A. Bullock, cashier.

(See Trustee's Exhibit No. 19.)

It cannot now be claimed on the part of either the bank or its officers that they were not informed of the financial or insolvent condition of the debtor.

On the contrary, they were well informed and were parties in an endeavor to work out a private adjustment. They cannot, under these facts and circumstances, attempt to exercise a preference.

Sec. 3054 or our Civil Code provides:

> "A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business."

Such a lien can only be exercised when done in good faith and without any attempt to exercise a preference.

See,

National City Bank vs. Hotchkiss, 31 A. B. R. 291.

Mechanics & Metals National Bank vs. Ernst et al., 31 A. B. R. 302.

Finally, it is claimed on behalf of respondents that the Fort Sutter National Bank is not a party to the proceeding now before the referee, and that the claim of the trustee if any, is a matter of a plenary action against the Fort [41] Sutter National Bank. I cannot agree with this contention. Summing up the testimony of all the witnesses it conclusively appears that J. M. Henderson, Jr., as president of the Fort Sutter National Bank, at all times had and still has personal control of these funds. It is unquestionably true that a bank is custodian of money, and as such must recognize the authorization or signature of the party in whose name the deposit is held by the

bank. The bank cannot of its own accord change or transfer this account without the direct instructions of its depositor, and as J. M. Henderson, Jr., and T. J. Scannell were trustees under an express trust agreement entered into by them under their own signatures, which agreement was also consented to in writing by the bank, I must conclude that the bank had actual knowledge of all of the transactions, and having this knowledge could not, even though instructed by its president, transfer the account to others without the consent of the beneficiaries under the trust agreement. I find further that J. M. Henderson, Jr., was the only officer in charge of the bank who at any time exerted any control over this account.

For the foregoing reasons the referee finds that the claim of J. M. Henderson, Jr., and T. J. Scannell that the funds are no longer under their control is not made in good faith, but that there is now in the hands of J. M. Henderson, Jr., and T. J. Scannell the sum of $12,883.81, which should be paid to A. L. May, said trustee in bankruptcy.

The question presented on this review is whether the referee erred in making an order directing the respondents, J. M. Henderson, Jr., and T. J. Scannell [42] to pay over to A. L. May, trustee in bankruptcy, the said sum of $12,883.81.

I hand up herewith for the information of the Judge the following papers:

The transcript of the testimony taken at the various hearings; the exhibits filed in this proceeding; the petition and answer on which this

certificate is granted and all other papers filed with me herein which are pertinent to this review

Dated, Sept. 16th, 1921.

Respectfully submitted,

S. W. CROSS,
Referee in Bankruptcy.

[Endorsed]: Filed at 11 o'clock and 10 min. A. M., Sep. 17, 1921. Walter B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [43]

In the Northern Division of the United States District Court, for the Northern District of California, First Division.

No. 495.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

(Order Affirming Order of Referee Directing J. M. Henderson, Jr., and T. J. Scannell to Pay to the Trustee Herein the Sum of $12,883.81.)

HENRY A. JACOBS, Esq., and G. B. BLANCKENBURG, Esq., Attorneys for Trustee.

ARCHIBALD JOHNSON, Esq., and A. A. DeLIGNE, Esq., Attorneys for Respondents.

ON REVIEW OF REFEREE'S ORDER DIRECTING J. M. HENDERSON, JR., AND T. J. SCANNELL TO PAY TO THE TRUSTEE IN BANKRUPTCY $12,883.81.

There is no question here of directing the bank to pay over funds claimed by it. The order is that

J. M. Henderson, Jr., and T. J. Scannell pay over to A. L. May, Trustee in bankruptcy, the sum of $12,883.31. This money they received as trustees for the creditors of the bankrupt, and as such trustees, they are bound to account for it. The order is therefore affirmed.

March 8th, 1922.

M. T. DOOLING,
Judge.

[Endorsed]: Filed at 11 o'clock and —— min. A. M., March 9, 1922. Walter B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [44]

In the Northern Division of the District Court of the United States, for the Northern District of California, First Division.

No. 495—IN BANKRUPTCY.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

Assignment of Errors.

J. M. Henderson, Jr., and T. J. Scannell, appellants in the above-entitled suit, pray for a reversal of the order and decree made and entered on the 8th day of March, 1922, *by* the Northern Division of the District Court of the United States, for the Northern District of California, First Division, in the above-entitled suit, affirming the order of S. W. Cross, Referee in bankruptcy of the City of Sacramento, in said district, ordering and directing

said appellants to pay and deliver unto A. L. May, the trustee in bankruptcy in the above-entitled cause, the sum of twelve thousand eight hundred and eighty-three and 81/100 dollars.

J. M. Henderson, Jr., and T. J. Scannell hereby assign error to the said order and decree in the particulars hereinafter stated.

The subject matter of the proceedings comprises the following facts:

Geo. W. Cowen Co., Inc., was by an order, judgment and decree of the above-entitled court, made and entered on the 15th day of December, 1920, adjudged a bankrupt on a petition filed by creditors of said Geo. W. Cowen, Co., Inc., againt said corporation. A. L. May was appointed trustee [45] of the estate of said bankrupt, thereafter qualified as such and ever since has continued to act in that capacity.

Said proceeding and cause was referred to S. W. Cross, Referee in Bankruptcy at Sacramento, California.

On the 28th day of January, 1921, the said trustee filed a petition with said referee in which it is averred that on September 15th, 1920, and within four months of the filing of the petition in bankruptcy, the bankrupt had made an assignment of all its business and property to these petitioners, Henderson and Scannell, as trustees for the benefit of the bankrupt's creditors; that from that date until November 4th, 1920, said Henderson and Scannell acted as such trustees, conducted the business of the bankrupt, made sales of goods,

collected large sums of money, and that they had not turned over to the receiver or trustee in bankruptcy moneys so collected to an amount in excess of twelve thousand dollars. The petitioner prayed for an order directing said Henderson and Scannell to show cause why they should not pay over and deliver said sums of money so collected by them unto said trustee.

These petitioners, Henderson and Scannell, filed a joint answer in which they averred that the trust agreement referred to in the petition never became effective; that Henderson refused to act as such trustee until the trust agreement should be signed by all the creditors of the bankrupt, which was never done, and never did act as trustee or assume any such duties or trust; that Scannell had been the manager of the bankrupt's business prior to the time of the proposed assignment in trust, and while [46] not assuming to act under the trust agreement, continued to conduct the business of the bankrupt pending the time that the trust agreement should be executed by the bankrupt's creditors and with the assumption that it would shortly become effective; that ever since the bankrupt had been in business it had done its banking business with the Fort Sutter National Bank and that this practice continued after the date of the trust agreement and until the business was taken over by the receiver in bankruptcy; that during said period there had been deposited in said Fort Sutter National Bank by Scannell, in the regular course of business and without any intention to prefer the

bank, the sum of twenty-two thousand six hundred and seventy-one and 58/100 dollars, and there had been withdrawn on checks to pay current expenses of the business the sum of nine thousand seven hundred eighty-seven and 77/100 dollars; that no part of said moneys had been so deposited at the instance of Henderson, or of any other person; and that the Fort Sutter National Bank claimed the difference of twelve thousand eight hundred and eighty-three and 81/100 dollars as a setoff on a note to it of the bankrupt for fifteen thousand dollars and that the Sacramento-San Joaquin Bank, the successor in interest of the Fort Sutter National Bank, now holds said moneys under a claim of right of setoff; that the referee had no jurisdiction to summarily require the respondents, or either of them, to pay said moneys to the trustee, and that said moneys were not in their, or either of their, possession, or subject to their, or either of their, control; the Referee decided the matter [47] in favor of the Trustee in Bankruptcy and against Henderson and Scannell, and ordered said Henderson and Scannell to pay over unto the Trustee in Bankruptcy the sum of twelve thousand eight hundred eighty-three and 91/100 dollars.

Upon a petition for review of the referee's order the above-entitled Court affirmed the order of the referee and directed Henderson and Scannell to pay said moneys over to the Trustee in Bankruptcy.

Neither the Fort Sutter National Bank nor the Sacramento-San Joaquin Bank, its successor in interest, were parties to said proceeding.

Henderson and Scannell contended that neither of them acted as trustee for the bankrupt; that the moneys referred to were deposited, or caused to be deposited by Scannell as the manager of the business of the bankrupt in the usual and ordinary method that had been pursued prior to the bankruptcy proceedings and prior to the time that such deposits were made; that such deposits were made in good faith and without any intention to prefer the Fort Sutter National Bank; that said moneys were no longer within the possession or control of either of them, and that the same were held by the Fort Sutter National Bank, or its successor in interest, the Sacramento-San Joaquin Bank, under a *bona fide* claim of a right of setoff made by said banks on the note due from the bankrupt to the Fort Sutter National Bank, or its successor in interest in the principal sum of fifteen thousand dollars; that the question was one between the trustee and the Fort Sutter National Bank and Sacramento-San [48] Joaquin Bank as to whether said banks or either of them had been preferred and whether said banks had a right to the setoff of which they claimed.

The Court erred in affirming the said order of the Referee in Bankruptcy ordering and requiring Henderson and Scannell to pay over to the Trustee in Bankruptcy said sum of twelve thou-

sand eight hundred eighty-three and 81/100 ($12,883.81) dollars, thereby deciding:

1. That said moneys were then in the possession or under the control of Henderson and Scannell, and that they were in a position to pay said moneys as ordered.

2. That the possession of said moneys by the bank was the possession of Henderson and Scannell or one of them.

3. That Henderson and Scannell or one of them could compel the bank to redeliver to them or to the trustee said moneys.

4. That Henderson, as an officer of the bank, was able to and was bound to compel action on the part of the bank against what the bank claimed to be its rights in the premises, without the opportunity of the bank to be heard in the matter in a proper forum.

5. That the claim of Henderson and Scannell that the bank held the possession of the money was in bad faith and that the claim of the banks' was in bad faith and made in collusion with Henderson and Scannell.

6. That the claim of right of setoff by the banks was unfounded. [49]

7. That the referee had jurisdiction to determine the validity of the banks' claim without the banks or either of them being parties to the proceeding, or consenting to the jurisdiction of the referee to determine that question.

8. That Henderson deposited or was responsible

for the deposit of said moneys in the Fort Sutter National Bank.

9. That Henderson collected or received said moneys into his possession, or the joint possession of himself and Scannell.

10. That Henderson alone or jointly with Scannell acted as trustee of the business and property of the bankrupt.

11. That the deposit of said moneys in the Fort Sutter National Bank was made in bad faith and with intent to prefer that bank over other creditors.

12. That the controversy was not one between the Fort Sutter National Bank and the Sacramento-San Joaquin Bank on the one hand and the trustee on the other which the former were entitled to have determined in a plenary action in the proper court.

Wherefore, by reason of the errors assigned, appellants pray that the order and decree of the lower court be reversed and the order to show cause be directed to be discharged.

Dated: March 14th, 1922.

ARCHIBALD M. JOHNSON,
A. A. DeLIGNE,
Solicitors for Appellants, J. M. Henderson, Jr., and T. J. Scannell.

[Endorsed]: Filed at 4 o'clock and 30 min. P. M., Mar. 16, 1922. W. B. Maling, Clerk. By Thomas J. Franklin, Dep. Clerk. [50]

In the Northern Division of the District Court of the United States, for the Northern District of California, First Division.

No. 495—IN BANKRUPTCY.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

Petition for Appeal by J. W. Henderson, Jr., and T. J. Scannell.

That heretofore, to wit, on the 15th day of December, 1920, A. L. May was duly appointed trustee of the estate of the above-named bankrupt, and on the 16th day of December, 1920, he qualified as such trustee by filing a bond in the sum of One Thousand Dollars, which said bond was then and there approved, and said May has ever since been and now is the duly appointed, qualified and acting trustee of the estate of the above-named bankrupt.

That theretofore, on the 3d day of November, 1920, the said Court in said proceedings made and entered its order referring said matter generally to S. W. Cross, Referee in Bankruptcy, at the city of Sacramento, county of Sacramento, State of California, and district as above entitled.

That thereafter, on the 28th day of January, 1921, said trustee filed his petition with said Referee in Bankruptcy in which it was averred that on September 15th, 1920, and within four months of the filing of the petition in bankruptcy in said

matter the bankrupt had made an assignment of all its business and property to the respondents, J. M. Henderson, Jr., and T. J. Scannell, [51] as trustees for the benefit of its creditors and that from that date until November 4th, 1920, the respondents Henderson and Scannell acted as such trustees, conducted the business of the bankrupt, collected large sums of money, and that they had not turned over to the receiver or trustee in bankruptcy moneys so collected to an amount in excess of Twelve Thousand Dollars.

Said petition prayed for an order directed to said Henderson and Scannell to show cause why an order should not be made directing and requiring them to turn over to the trustees in bankruptcy all moneys so collected.

Thereafter, on the —— day of February, 1920, the respondents Henderson and Scannell filed their answer to said petition and said order to show cause with said Referee in Bankruptcy and in which said answer it was denied that said Henderson ever become or ever acted as such trustee, or had ever received any of said moneys; the answer further denied that said Scannell ever became or acted as such trustee, but averred that during the period mentioned in said petition the said Scannell had acted as manager of the business of said bankrupt and during said period had collected the sum of Twenty-two Thousand Six Hundred and Seventy-one and 58/100 Dollars, and had deposited the same in the Fort Sutter National Bank of Sacramento; that of said sum so deposited

there had been withdrawn on checks to pay current expenses of the said business the sum of Nine Thousand Seven Hundred and Eighty-seven and 77/100 Dollars; that said moneys had been deposited with [52] said Fort Sutter National Bank in the ordinary and usual course of business and without any intention to prefer said Fort Sutter National Bank; that the balance of said moneys not withdrawn as aforesaid remained in the possession of said Fort Sutter National Bank, which said bank claimed said difference of Twelve Thousand Eight Hundred and Eighty-three and 81/100 Dollars as a setoff on a note to it of the bankrupt for Fifteen Thousand Dollars; that the Sacramento-San Joaquin Bank, the successor in interest of the Fort Sutter National Bank, now holds said moneys under a claim of right of setoff and that the Referee had no jurisdiction to summarily require the respondents or either of them to pay said moneys to the trustee.

That thereafter said Referee, on the 23d day of June, 1921, duly made and gave his order directing and requiring the said respondents, Henderson and Scannell, to pay and deliver unto said trustee in bankruptcy said sum of Twelve Thousand Eight Hundred and Eighty-three and 81/100 Dollars; that thereafter said respondents Henderson and Scannell, on the 1st day of July, 1921, filed in the above court in the above-entitled cause, their petition praying for a review by said Court of the order of said Referee given and made on said 23d day of June, 1921, as aforesaid, directing and requiring

them to pay and deliver unto said Trustee in Bankruptcy said sum of Twelve Thousand Eight Hundred Eighty-three and 81/100 Dollars. [53]

That thereafter the above Court in the above-entitled cause gave, made and entered its order and decree affirming said order of said Referee ordering and directing the said respondents, Henderson and Scannell, to pay and deliver unto said trustee in bankruptcy the sum of Twelve Thousand Eight Hundred and Eighty-three and 81/100 Dollars.

Your petitioners, J. M. Henderson, Jr., and T. J. Scannell, believed that said orders and decree are and each thereof is erroneous and that injustice will be done if the same, or either of them, would be carried into effect.

WHEREFORE, your petitioners, J. M. Henderson, Jr., and T. J. Scannell, appeal to the next United States Circuit Court of Appeals for the Ninth Circuit, to be held in and for said circuit at the City and County of San Francisco, in the Northern District of California, from said order and decree made and entered on the 8th day of March, 1922, affirming the order of said Referee made on the 23d day of June, 1921, ordering and requiring the said J. M. Henderson, Jr., and T. J. Scannell to pay and deliver unto the said Trustee in Bankruptcy said sum of Twelve Thousand Eight Hundred and Eighty-three and 81/100.

Your petitioners pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said orders and

decree were hade, duly authenticated, may be sent to the said United States [54] Circuit Court of Appeals for the Ninth Circuit, in the manner and form prescribed by Rule No. 75, of the Rules of Practice for the equity courts of the United States.

Your petitioners further pray that the proper order relating to the required security for costs and damages on appeal as well as for a supersedeas be made.

Dated: March 14th, 1922.

ARCHIBALD M. JOHNSON,
A. A. DeLIGNE,

Solicitors for Petitioners, J. M. Henderson, Jr., and T. J. Scannell. [55]

Northern District of California,
County of Sacramento,—ss.

J. M. Henderson, Jr., being first duly sworn, deposes and says:

That he is one of the petitioners named in the foregoing petition for appeal.

That T. J. Scannell, the other of said petitioners, is now residing and is at present in the City of New York, as affiant is informed and believes, and therefore he makes this affidavit on behalf of himself and also behalf of said Scannell.

That the appeal of said petitioners from the order of decree, made and entered on the 8th day of March, 1922, by the District Court of the United States, in and for the Northern District of California, in the within entitled suit, is not taken for delay, but is taken because petitioners believe injustice would be done if the said order and

decree should be carried into effect; that the facts therein stated are true.

That affiant also makes this affidavit on behalf of said Scannell because the facts set forth herein and in said petition are within the knowledge of affiant and because he has been requested so to do by the attorneys for said Scannell, who have authority to file this petition on behalf of said Scannell, as well as for affiant.

J. M. HENDERSON, Jr.

Subscribed and sworn to before me this 16th day of March, 1922.

[Seal] E. J. OEHLER,
Notary Public in and for the County of Sacramento, State of California. [56]

(Order Allowing Appeal.)

On reading and filing the above petition of J. M. Henderson, Jr., and T. J. Scannell and the assignment of errors presented therewith, it is ordered that said appeal be allowed as prayed for and that said appeal shall operate as a supersedeas and shall stay all further proceedings in said cause, upon the filing by said petitioner of a bond in the sum of $15,000, with sufficient surety to be approved by this Court.

Done and dated this 16th day of March, 1922.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed at 4 o'clock and 30 min. P. M. Mar. 16, 1922. W. B. Maling, Clerk. By Thomas J. Franklin, Dep. Clerk. [57]

In the District Court of the United States in and for the Northern District of California, First Division.

No. 495.

In the Matter of GEO. W. COWEN CO., INC., in Bankruptcy.

Bond on Appeal.

KNOWN ALL MEN BY THESE PRESENTS: THAT, WHEREAS, J. M. Henderson, Jr., and T. J. Scannell have appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from an order and decree of the above-entitled court, made and entered herein on the 8th day of March, 1922, affirming an order of the Referee in Bankruptcy of said court to whom had been referred the above-entitled matter, which said order of said Referee in Bankruptcy ordered and required J. M. Henderson, Jr., and T. J. Scannell to pay over unto the Trustee in Bankruptcy appointed in the above-entitled matter the sum of Twelve Thousand Eight Hundred Eighty-three and 81/100 ($12,883.81) Dollars, which said order found and decided was in the possession of said J. M. Henderson, Jr., and T. J. Scannell and belonged to the estate of said bankrupt;

AND, WHEREAS, the said J. M. Henderson, Jr., and T. J. Scannell desire, during the progress of the said appeal, to stay all proceedings in the matter of said order;

AND, WHEREAS, the above-entitled court made an order herein on the 16th day of March, 1922, granting [58] the stay of such proceedings, providing the said J. M. Henderson, Jr., and T. J. Scannell filed in the above-entitled matter a bond approved by the above-entitled Court in the sum of $15000.00 (Fifteen Thousand Dollars);

NOW, THEREFORE, we, the said J. M. Henderson, Jr., and T. J. Scannell, as principals, and A. P. Scheld, W. S. Kendall as sureties, in consideration of such stay of proceedings, and of the premises, jointly and severally undertake and promise that in case the said order be affirmed by the said Circuit Court of Appeals, or the said appeal be withdrawn or dismissed, we will pay all costs which may be awarded by said Circuit Court of Appeals, against said J. M. Henderson, Jr., and T. J. Scannell, or either of them as such appellants, and all damages that the trustee in bankruptcy in said proceeding may sustain by reason of the said appeal, such costs and damages not to exceed the sum of $15000.00 (Fifteen Thousand Dollars.)

IN WITNESS WHEREOF, the said J. M. Henderson, Jr., and T. J. Scannell, as principals, and said A. P. Scheld and W. S. Kendall as sureties, have hereunto set their hands this 16th day of March, 1922.

J. M. HENDERSON, Jr.
T. J. SCANNELL.
By A. A. DeLIGNE,
His Attorney.
A. P. SCHELD.
W. S. KENDALL. [59]

State of California,
County of Sacramento,—ss.

A. P. Scheld and W. S. Kendall, being first duly sworn, depose and each for himself says:

That he is a resident and freeholder of the County of Sacramento, State of California.

That he is worth the amount stated as the penalty in the foregoing bond in unencumbered property not exempt from execution or forced sale.

A. P. SCHELD.
W. S. KENDALL.

Subscribed and sworn to before me this 17th day of March, 1922.

[Seal] F. J. OEHLER,
Notary Public.

The foregoing bond is approved.
Let it be filed.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed at 1 o'clock P. M. March 17, 1922. W. B. Maling, Clerk. By Thomas J. Franklin, Dep. Clerk. [60]

In the District Court of the United States in and for the Northern District of California Northern District.

In the Matter of GEO. W. COWEN CO., INC., Involuntary Bankrupt.

Narrative Statement of Evidence Taken on Hearing of Order to Show Cause Directed to J. M. Henderson, Jr., and T. J. Scannell.

The matter of the order to show cause theretofore issued directed to J. M. Henderson, Jr., and T. J. Scannell came on to be heard on Monday, February 14th, 1921, before S. W. Cross, Referee in Bankruptcy, at Sacramento, California.

The trustee of the bankrupt estate was represented by his counsel, Henry A. Jacobs, Esq., Clarence F. Shuey, Esq., and H. M. Creech, Esq., appeared as counsel on behalf of certain creditors.

A. A. De Ligne appeared as counsel on behalf of J. M. Henderson, Jr., and T. J. Scannell, whereupon, the following proceedings were had and the following testimony was taken, to wit:

Mr. De Ligne filed and read the answer of J. M. Henderson, Jr., and T. J. Scannell to the order to show cause and the petition therefor. Mr. De Ligne objected to the jurisdiction of the Referee, stating that [61] the order to show cause should be discharged, because the money referred to in the order to show cause was in the possession of the Sacramento-San Joaquin Bank, the successor in interest of the Fort Sutter National Bank; that

neither of said banks was a party to the proceeding and that neither of the respondents, Henderson or Scannell, could take the money from the bank, unless the bank voluntarily surrendered it, which it refused to do; that the bank claimed the moneys by virtue of claim of setoff and that the rights of the bank in the premises could only be determined and the money could only be recovered in a plenary action to which the bank was a party.

It was, however, conceded by Mr. De Ligne that the Referee had a right to take evidence for the purpose of ascertaining whether the answer of the respondents, Henderson and Scannell, was made in good faith, and that the facts just stated by him were true.

Mr. Jacobs at the commencement of the hearing requested of Mr. J. M. Henderson, Jr., one of the respondents herein, that said respondent produce the original ledger sheets and signature cards on file with the Sacramento-San Joaquin Bank, successors in interest of the Fort Sutter National Bank, showing the account of the Geo. W. Cowen Co., Inc., with said bank, Mr. Henderson having been present at the morning session before said referee wherein the account of said J. M. Henderson, Jr., as receiver, was regularly on the morning's calendar for settlement. At that hearing Mr. Henderson stated that he would so produce at the afternoon session the records called for. Mr. Henderson stated that he had a copy of the account and records of the bank. Whereupon, Mr. Jacobs again stated that he did not desire the copy as he

had already inspected such copies, but that he desired the original.

Mr. JACOBS.—I want the original. This is a copy. I want the signature cards also, Mr. De Ligne.

Mr. DeLIGNE.—Well, we will get you the original. This is an exact—or will be just exactly like that, typewritten in the same way. Now, then, as to the signature cards, we will get the originals of them.

Mr. JACOBS.—I would like the originals. If it is going to cause you any great amount of difficulty in removing these and bringing them [62] here, I could go down to the bank and check them over there at some time.

Testimony of T. J. Scannell.

Thereupon, T. J. SCANNELL was called as a witness on behalf of the trustee of the estate in bankruptcy and examined by Mr. JACOBS. Mr. Scannell was duly sworn and testified substantially as follows:

That he was at present employed by O. A. Hale Company or Hale Bros. at San Jose and resided in that city; that he was employed by Geo. W. Cowen Co., Inc., from the time that the company began business in Sacramento until the appointment of the receiver in the bankruptcy proceedings against that company and the sale of the assets; that his duties at first were to act as merchandise man for the Ready-to-Wear Department, and afterwards he was appointed superintendent of the

(Testimony of T. J. Scannell.)

store; that his employment began on March 15, 1920, and was appointed superintendent about the first of April of that year; that he had nothing to do with the funds of the company; that only during the absence of Mr. Cowen in New York during the month of July checks were signed or drawn by him on the banking account; that this lasted until he (Scannell) went to New York about the 4th of August; that these checks were also signed by Mr. Kennerly; that upon his departure for New York about the 4th of August he told the bank that if necessary Mr. Kennerly could sign the checks alone; that this was at Mr. Cowen's instructions which were received by him verbally and were given when he left for New York; that he had no conversation with anyone connected with the bank relative to the affairs of the Cowen Company other than the paying teller; that he did not know what instructions were given to the bank by Mr. Cowen other than statements made by Mr. Cowen to him and the fact that the checks were to be signed jointly by Mr. Kennerly and himself; that he did not know whether the instructions to the bank to honor the signature of himself, with Mr. Kennerly, were ever revoked by Mr. Cowen; that there was no occasion for him to sign checks further upon his return, and that he never made any efforts to ascertain whether this authorization had been revoked; that he signed the agreement referred to in his answer to the order to show cause about the 15th of September, 1920, in Mr. Cowen's private

(Testimony of T. J. Scannell.)

office, and as nearly as he could recall there were present: Mr. Geo. W. Cowen, Mr. Fred Cowen, Mr. Wiener, Mr. Michaels and Mr. Rubinger. Mr. Wiener was a member of Nathan-Weiner [63] Company of New York. Mr. Rubinger was his attorney. Nathan-Wiener Company were not creditors of the concern but were stockholders; that he did not know whether or not Mr. Henderson was present at that time; that he did not remember his being there. Prior to the time he signed the instrument the matter had never been discussed with him at all, and that he understood that the agreement was to be entered into to permit Mr. Cowen to be free to get more money to keep carrying on the business with; that he had prior to signing it been asked by Mr. Cowen to act as trustee; that two or three weeks after the signing of the agreement they had a general meeting in Mr. Cowen's office one evening, at which Mr. Geo. W. Cowen, Mr. Fred Cowen, Mrs Cowen, Mr. Kennerly, Mr. Henderson and himself were present; that at that meeting it was stated that the trusteeship would become effective upon the agreement being signed by all of the creditors of the corporation, and that then Mr. Henderson and himself would act as trustees and in the meantime it was agreed by Mr. Henderson and Mr. Cowen that the witness should continue to act as general manager of the store; that after he signed the Trust agreement and prior to the meeting two or three weeks thereafter just referred to, he might have seen Mr.

(Testimony of T. J. Scannell.)

Henderson two or three times, but that he did not see Mr. Henderson or anyone connected with the bank relative to the Cowen Company or Geo. W. Cowen; that he probably did see Mr. Henderson between those two or three times because he was in and out of the bank down there all the time; that sometimes he saw their receiving teller, sometimes their paying teller; that he had an account there, you must understand, in the savings bank, his own personal account; that he did not believe he went down to the bank at any time during that period of time on business for the Geo. W. Cowen Co., that after September 15th the witness signed checks, the first being signed on the next following pay day, which was either on the 17th of September or the 2d of October; that his instructions to sign checks did not come from Mr. Henderson, but came solely from Mr. Cowen; that the first instructions to sign checks from Mr. Cowen was at the time the first pay day came through, which would be either the 17th of September or the second of October.

The witness identified and Mr. Jacobs offered in evidence and there was received in evidence a series of checks to various persons and for [64] various amounts and consecutively numbered, all of which were in the same form, said forms having printed thereon the words:

No.——. Sacramento, Cal., ——, 192—.
Fort Sutter National Bank, Sacramento, Calif.
90–36.
GEO. W. COWEN CO., INC., KAY STREET.
Pay —— Dollars $—— to the order of ————.
GEO. W. COWEN CO., INC.
————————,
President.
————————,
Secretary.

Commencing with check 1500, dated September 24, 1920, a rubber stamp bearing the word "Trustees" was inserted upon each of said checks over the words "Geo. W. Cowen Co., Inc., at the signature column, and again below the word "President," a line having been drawn through both the words "President" and "Secretary," and which checks thereafter all bore the signature "T. J. Scannell," each of said checks then being in the form as follows:

No.——.
Sacramento, Cal.——, 192—.
To THE FORT SUTTER NATIONAL BANK,
Sacramento, Cal. 90–36.
GEO. W. COWEN CO., INC., KAY STREET,
Pay —— Dollars $—— to the order of ————.
Trustees:
GEO. W. COWEN CO., INC.
————————,
Trustees.
————————,
Secretary. [65]

The first of said checks being No. 1475 and dated September 3d, 1920, is mutilated, but was apparently signed by Geo. W. Cowen, as president.

Checks No. 1486, 1487 and 1488, all dated Sep-15th, 1920, were signed by Geo. W. Cowen, as president.

Checks No. 1478 and 1479, both dated September 7th, 1920, were signed by Geo. W. Cowen, as president.

Checks No. 1480, 1481, 1482, 1483, 1484, 1485, all dated September 8th, 1920, were signed by Geo. W. Cowen as president.

Checks No. 1486, 1487 and 1488, all dated September 10th, 1920, were signed by Geo. W. Cowen, as president.

Checks No. 1489 and 1490, both dated September 11th, 1920, were signed by Geo. W. Cowen, as president.

Checks No. 1491, 1492 and 1493, all dated September 13th, 1920, were signed by Geo. W. Cowen, as president.

Check No. 1494, dated September 14th, 1920, was signed by Geo. W. Cowen, as president.

Checks No. 1495 and 1496, both dated September 15th, 1920, were signed by Geo. W. Cowen, as president.

Check No. 1497, dated September 16th, 1920, was signed by Geo. W. Cowen, as president.

Check No. 1498, dated September 21st, 1920, was signed by Geo. W. Cowen, as president.

Check No. 1499, dated September 22d, 1920, was signed by Geo. W. Cowen, as president. [66]

Check No. 1500, dated September 24th, 1920, was signed by T. J. Scannell, trustee, in writing under the printed name of Geo. W. Cowen Co., Inc.

Check No. 1501, dated September, 24th, 1920, has the word "trustees" written above the printed name, Geo. W. Cowen Co., Inc., and is signed T. J. Scannell, trustee.

Check No. 1502, dated September 25th, 1920, is signed the same as check No. 1501.

Check No. 1503, dated September 28th, 1920, has the word "trustees" stamped above the name of Geo. W. Cowen Co., Inc., and the signature of T. J. Scannell, under which there is stamped the word "trustees" and the words "President" and "Secretary" being erased.

Checks No. 1504 to 1523, both numbers inclusive, bearing various dates from September 29th to October 21st, 1920, are signed by T. J. Scannell, in writing, and the word "trustees" stamped above the words "Geo. W. Cowen Co., Inc., and also below the signature of Scannell. In some instances the words "President" and "Secretary" are scratched out and in other instances they are not.

Check No. 1524, dated October 22d, 1920, is signed by Geo. W. Cowen, as president. This check was in favor of A. Grace Cowen, for the sum of $250.

Checks No. 1525, 1526, 1527, 1528, 1529, 1530, 1531, 1532, 1533, 1534 and 1535, bearing various dates from October 23d to October 30th, 1920, are all signed by T. J. Scannell, with the word "trus-

(Testimony of T. J. Scannell.)

tees" stamped above the printed name of Geo. W. Cowen Co., Inc., and below the signature of Scannell, except that in a few cases the stamped word "trustees" appears but once. [67]

Check No. 1536, dated November 22d, 1920, is signed below the name Geo. W. Cowen Co., Inc., by T. J. Scannell. The words "President" and "Secretary" are not scratched out, nor does the word "trustees" appear on the check. This check is stamped on the back, J. M. Henderson, Jr., and T. J. Scannell, trustees, Geo. W. Cowen Co., Inc., The check was in favor of E. W. Kennerly for $15.40, and was also endorsed by Mr. Kennerly.

A check numbered 1537, dated October 4th, 1920, in favor of Geo. W. Cowen Co., Inc., for $84.01, is not signed and is marked "void."

Check No. 1538, dated November 4th, 1920, is signed by T. J. Scannell, with the word "trustees" being stamped thereon, and without the words "President and "Secretary" being erased. The check was in favor of Geo. W. Cowen Co., Inc., and is also for the amount $84.01, and is stamped on the back J. M. Henderson, Jr., and T. J. Scannell, trustees, Geo. W. Cowen Co., Inc. All checks noted as being stamped are stamped with a rubber stamp.

The witness continuing, testified:

That he did not believe the word "trustees" was stamped on the checks which bore his signature at the time he signed them. He stated that the checks were presented with the names of the

(Testimony of T. J. Scannell.)

parties to whom they were payable and the amounts all written in, and then he signed the checks and sent them back to Mr. Kennerly, who had complete charge of everything in reference to the office, and that Kennerly put them through the machine, and that at the same time he [68] put them through the machine, he must have put these stamps on them, and that he had nothing further to do with them; that he did not distribute the checks and did not again see them until some time in December, or thereabouts, when he happened to come across them in the safe, and at that time he believed they were stamped with the word "trustees," although he had not taken any particular notice of it.

The witness was shown a check in his own favor for $187.50, which bore the endorsement "T. J. Scannell," and identified the signature as his own. The check was dated October 2d, 1920, and the witness testified the stamp may have been on it at the time he received it, but that he could not swear to it.

The witness testified that when Mr. Cowen requested him to sign the checks he did not make any explanation as to the reason for his signing them, and it was just merely a question as to who would sign the checks and Cowen had said that he better go ahead and sign them; that he did not recall the time of day Mr. Cowen came to him and said that he was to sign these checks; that it was something different than what he had been doing

(Testimony of T. J. Scannell.)

prior to that time and that he would naturally remember the facts and incidents relative to that, very clearly, although he did admit that he could not remember what happened or whether the stamp was on the checks at that time or not; that Mr. Cowen requested him to sign the checks but did not make any explanation as to the reason for his, Scannell, signing the checks; that it was just simply a question as to who was going to sign the checks and Mr. Cowen said, "Well, you better go ahead and sign them"; that they all presumed there was going to be a trusteeship and the mere matter of fact of his signing the checks did not strike him as anything odd under those conditions.

The witness denied that there was a conversation between some parties there, Mr. Cowen, Mr. Henderson, or someone and himself, between the 15th of September and the 2d of October as to what was to be done relative to the signatures and the disposition of the funds.

Continuing, the witness stated that nothing was said about signing checks, except that he had said to Mr. Cowen, "Who was going to sign the checks?" and he said, "You sign them." [69]

The witness testified that he had no instructions from anyone relative to the disposition of the funds of the corporation, and that he was not instructed at any time between the dates mentioned as to the depositing of money and that all he knew prior to the time that he signed the checks is the fact that

(Testimony of T. J. Scannell.)

Mr. Cowen said to him 'You sign the checks'; that he may have signed a signature card early in July, but that he did not think that he had, because they had his personal signature on record there, and that the whole transaction was conducted entirely by Mr. Geo. W. Cowen; that he did not execute any signature card after he signed the agreement in Mr. Cowen's office on the evening of September 15th.

The witness denied that he had had any conversation at any time with Mr. Henderson relative to his right to sign checks, and that he heard nothing further about the matter of the trusteeship until the conference was called about two or three weeks after September fifteenth, when a conference was called again in Mr. Cowen's office at which meeting Mr. Henderson was present. At that conference Mr. Henderson suggested that the local creditors be interviewed and their signatures obtained. Mr. Cowen was to do this; that he was positive that he signed checks before that conference; that he read of the filing of the Petition in Bankruptcy against the company and that he had talks with Mr. Cowen and his brother as to the effect it would have on the business, and that he also had a talk with Mr. Henderson on the subject some days thereafter, perhaps less than a week or ten days thereafter, but that he did not discuss the question with Mr. Henderson as to the effect it would have on his signing checks; that his discussion with Mr. Henderson related to the situa-

(Testimony of T. J. Scannell.)

tion in a general sort of way, the discussion being to the effect that "we couldn't understand why New York creditors should be forcing the concern into bankruptcy, and that the trusteeship, if it went through, would be for the best interest of the creditors; that the witness did everything he could to persuade his friends in New York, who were creditors, to exercise their power to help the trusteeship being made effective; that subsequent to this time he perhaps saw Mr. Henderson as often as one or twice a week from then on, but talked with him very seldom. [70]

The witness testified that he personally had nothing to do with the bank account, other than signing checks between September 15th and the date of the appointment of the receiver on November 3d, but that he recalled that following the 2d of October up to the time of the appointment of the receiver he did sign checks, and that all he had to do about the financial affairs of the company, relative to the bank transactions, was just simply the signing of checks.

Mr. Jacobs then temporarily withdrew Mr. Scannell from the stand and called Mr. J. M. HENDERSON, Jr. Mr. Henderson was duly sworn and testified as follows:

Testimony of J. M. Henderson, Jr.,

That he resides in the city of Sacramento and that he was the president of the Fort Sutter National Bank up to the time that the Sacramento-

(Testimony of J. M. Henderson, Jr.)

San Joaquin Bank bought its assets, and was then and ever since has been the President of the Sacramento-San Joaquin Bank; that he is a stockholder to a pretty large extent, in fact one of the principal stockholders of the latter; that the Geo. W. Cowen Co., Inc., banked with the Fort Sutter National Bank, which was afterwards absorbed by the Sacramento-San Joaquin Bank; that the account of Geo W. Cowen Co., Inc., was not under his personal supervision or direction, as the witness was located at the Fifth and J. Street bank; that Mr. Geo. S. Bullock was in charge of the Fort Sutter Bank and of the account of the Cowen Company; that he was cashier of the Fort Sutter National Bank, which was afterwards absorbed by Cowen Company transacted business with the bank up to some time in November; he is no longer with us.

The witness was shown a signature card on a printed form for the Geo W. Cowen Co., account with the Fort Sutter National Bank, which was in the words and figures following, to wit:

Name of Corporation or Firm:

Geo. W. Cowen Co., Inc.

The Fort Sutter National Bank of Sacramento
Authorized Signatures.

President—Geo. W. Cowen

Vice-President

Cashier

Asst. Cashier

(Testimony of J. M. Henderson, Jr.)

Secretary

Treasurer

[Stamped Across Face]: Cancelled Sept. 24, 1920 G. S. B. [71]

and identified the writing thereon, "Cancelled Sept. 24, 1920, G. S. B.," as the writing of George S. Bullock.

He was shown another similar card, which was in the words and figures following, to wit:

Name of Corporation or Firm:

Geo. W. Cowen Co., Inc.

The Fort Sutter National Bank of Sacramento

Authorized Signatures.

President—Geo. W. Cowen

Vice-President

Cashier

Asst. Cashier

Secretary

Treasurer

[Stamped Across Face]: Cancelled Sept. 24, 1920 G. S. B. A/B 6/20

and identified the written words, "Cancelled Sept. 24, 1920, G. S. B.," as the writing of George S. Bullock.

He was shown a third signature card, which was in the words and figures following, to wit:

(Testimony of J. M. Henderson, Jr.)

Write Signature Three Times

F. E. MICHEL, Jr.
F. E. MICHEL, Jr.
F. E. MICHEL, Jr.
GEO. W. COWEN CO.

Remarks:
1/10/20

[Stamped Across Face]: Cancelled Sept. 24, 1920 G. S. B.

and identified the writing of the words thereon, "Cancelled Sept. 24, 1920, G. S. B.," as being in the handwriting of George S. Bullock. [72]

The witness testified that he knew F. E. Michael, but not acquainted with his signature; that Michael was a stockholder of the Cowen Company, although he may have sold his stock in September or October; that he had never instructed Mr. Bullock to make a notation across the face of the signature cards shown him, "Cancelled September 24th, 1920, G. S. B."; that those are the only signature cards which they have for the account of Geo. W. Cowen, Inc., that the boys looked very thoroughly and that is all they could find; that they kept no record to show what signature cards the bank has other than the card itself, and that if the cards were to become lost, they would have no record to show whose signature was to be recognized, or the date the instruction was given.

Mr. Henderson was then withdrawn by Mr. JACOBS and E. W. KENNERLY was called by Mr. JACOBS as a witness and duly sworn. Kennerly testified as follows:

Testimony of E. W. Kennerly.

That he resides at 914 Ninth Street, in the City of Sacramento; that he is employed by the Sacramento-San Joaquin Bank as a clerk and has been so employed for three months. Prior to that time he was office manager for Geo. W. Cowen Co., Inc., and was so employed from April 1st to November 4th, 1920; that prior to that time he was in the Army; prior to entering the Army he was office manager and cashier for the Wasserman-Gattman Company, that his duties during his employment with the Cowen Company were that of office manager, credit manager and cashier; that he handled the funds of the company and all checks passed through his hands and were subject to his control; that he personally made out all checks and deposited the funds of the company under the instructions of Geo. Cowen; that these instructions were given him when he entered the employment of the Geo. W. Cowen Co., Inc., and were never changed at any time; that his duties remained the same and that he made out all checks and deposited all money during the entire period of time that he was in the employ of Geo. W. Cowen Co., Inc., under the personal supervision of Mr. Geo. W. Cowen; that he was present at a meeting held in the office of Mr. Cowen, of which he did not recall the date, where the agreement of trusteeship [73] was discussed; that he did not see the agreement, but understood that Mr. Henderson and Mr. Scannell would be trustees, in case the agreement went into effect. He recalled that Mr. Henderson said that the trusteeship would go into effect as

(Testimony of E. W. Kennerly.)

soon as the agreement was signed by the necessary parties; that he did not personally see the agreement at that meeting but that he knew from the copy of the agreement that Mr. Scannell and Mr. Henderson would be trustees in case the agreement went into effect; that no one told him that Mr. Scannell and Mr. Henderson were to be trustees only in case it went into effect, but that he understood that it was to be only in case it did go into effect; that he recalled Mr. Henderson saying that the trusteeship would go into effect as soon as the agreement was signed by the necessary parties, and that Mr. Henderson was present at the meeting; that Henderson, Scannell, Geo. Cowen, Fred Cowen and himself were present at the meeting as far as he could remember; that was the only meeting he ever attended; that it seemed to him that it was about September; that he could not say whether Mr. Cowen authorized the bank to honor checks upon the joint signatures of himself and Mr. Scannell when Mr. Cowen went East, and that he never signed any checks, except once in the absence of Mr. Cowen he signed pay checks for one pay-roll; that he signed these checks jointly with Mr. Scannell; that he recalled that Mr. Scannell left for the East shortly after Mr. Cowen did, and that he may have signed checks without Scannell's joint signature, but did not remember.

The witness was then shown certain papers.

Mr. DeLIGNE.—I think you should have sworn him the checks before you questioned him.

Mr. JACOBS.—Well, I am not questioning him.

(Testimony of E. W. Kennerly.)

I will withdraw any insinuation,—I will state now that there is no insinuation on my part as to Mr. Kennerly testifying to anything but the truth. I think his mind is probably a little bit confused as to his answer. There are signatures on checks signed by you alone. I will ask you if those are not your signatures. [74]

The witness replied that the signatures were his; that it was true the checks were dated August 18th, and that he had been mistaken in saying that he had signed checks alone.

The witness was shown other papers by Mr. Jacobs, Mr. Jacobs stating that he was showing him another series of checks which bore the joint signatures; one of the checks being dated August 3d.

The witness identified his signature and stated that after seeing the two sets of checks his memory was refreshened in regard to the arrangement made for the signing of checks during Mr. Cowen's absence; that he recalled that Mr. Cowen arranged with the Fort Sutter National Bank for the joint signature of himself and Mr. Scannell to checks during Cowen's absence; that the witness had signed a signature card as he recalled in the office of the Cowen Company, but he had never gone to the bank; that if he remembered right, there were three, possibly more, signature cards signed by him on the same occasion; that he signed these signature cards prior to the time he signed the first check; that he did not know whether that authorization had ever been revoked, and had

(Testimony of E. W. Kennerly.)

never been advised by Mr. Cowen or anyone else that it had ever been revoked; that as far as he could remember it is true that he only signed the pay-roll checks, and that he did not recall that he signed any checks after Mr. Cowen's return; that Mr. Cowen returned from New York about the middle of August; that the meeting that he had spoken of was held possibly a couple of weeks before the filing of the Petition in Bankruptcy on October 12th; that the substance of what occurred at that meeting was that Mr. Henderson and Mr. Scannell would act as trustees when the trusteeship became effective; that he did not recall that anything was said about the conduct or management of the business pending the time that the trusteeship should go into effect; that no instructions were given to him at any time at that meeting by anyone relative to the signing of checks, and that nothing was said to him at that time by anyone as to any change in the method of depositing the money, and that he deposited the money just the same as before; that he made up the pay-roll semi-monthly; that the next pay-roll after September 15th was made upon the 18th, and that he couldn't say as to whether the checks for that pay-roll were signed by Mr. Cowen. [75]

Mr. Jacobs showed the witness certain papers, stating that he was showing him some checks dated the 18th, and asked him if they did not contain the signature of Mr. Cowen. The witness testified that the signatures were those of Geo. Cowen;

(Testimony of E. W. Kennerly.)

that there was no change in the method of signing the checks between the 15th and the 18th, but that there was a change some time later, when he thought the checks were signed by Mr. Scannell; that he had nothing to do with the arrangements that Mr. Scannell was to sign checks, and never discussed it with anyone; that he would not have permitted Mr. Scannell to sign checks without instructions, and that someone must have instructed him, but that he did not recall how it came about; that he might have permitted Mr. Scannell to sign checks upon the assumption that the trusteeship would be in effect, and that he took it for granted that the trusteeship would be effective; that prior to the 18th and to the date Scannell signed checks he looked to Mr. Cowen and took instructions from him as to the signing and as to the handling of the figures, but that he could not recall who had instructed him to recognize the signature and have Mr. Scannell sign checks; that he supposed that someone so instructed him, but that he couldn't say; that at that meeting there was a general discussion as to the trusteeship and he was informed that Scannell and Henderson were to act as trustees when the agreement went into effect; that that was what they discussed at the meeting, and Mr. Henderson, Mr. Cowen and Mr. Scannell entered into the discussion; that after that meeting he spoke to Mr. Cowen several times, but couldn't say when; that he had no dealings with Mr. Henderson at all, nor with Mr. Bullock, nor with anyone

(Testimony of E. W. Kennerly.)

else connected with the bank; that he did not recall of ever receiving any instructions from Mr. Scannell, and that he did not understand that it was part of his duties to take instructions from him; that he did not recall Mr. Scannell at any time giving him instructions, but would not say that he had not; that he had never received instructions from anyone that Mr. Scannell was to take charge of the business and to sign checks; that he couldn't say how it came about. [76]

Mr. Jacobs showed the witness a series of checks dated October second, 1920, the first one of which was numbered 1462 and drawn in favor of H. Rowe in the sum of twenty-two dollars and fifty cents, signed "Trustees, Geo. W. Cowen, Inc., T. J. Scannell, Trustee," including up to check number 1502, signed by T. J. Scannell, "Trustees." The witness testified that he personally made out the checks shown him and after making them out handed them to Mr. Scannell for signature; that it was the custom for the checks to be signed on the day of their date and that it was more than likely that the checks shown him were signed on that day; that one of the checks shown him, which was in his favor for the sum of one hundred dollars, dated October 2d, signed by Mr. Scannell, bears the witness' signature on the back and bears the "paid" stamp of the bank; that he did not know whether he cashed the check at the store or at the bank but that it was his custom to cash it at the bank; that the bank endorsement of payment looks

(Testimony of E. W. Kennerly.)

like 10–2–20. The check must have been paid either the 2d or 3d as all checks had to be paid by the 3d; all the other checks were drawn and delivered at the same time; all of the checks shown him bore his figures but were in one of the girl's handwriting, the name; that he had drawn a line through the printed portion of the checks underneath the words "Geo. W. Cowen Co.," to wit: "president and secretary," and had placed the rubber stamp "trustees" on them; that he did this just before delivering the checks to the employees and after Mr. Scannell had signed them; that he ran the line through the words "president and secretary" and placed the rubber stamp on the checks without anyone's instructions [77] that he personally purchased the rubber stamp without instructions from anyone and without authority, and that he did so because he took it for granted that the trusteeship would be in effect and he acted accordingly; that Mr. Cowen never instructed him to do that and that he could not recall the facts relating to a matter of importance such as the changed signature on the check and the Trusteeship stamped thereon.

Mr. JACOBS.—Now, Mr. Referee, I have been very indulgent with this witness, and I have given due regard to such things as lapses of memory, but I think it is time, when a man will sit there in that witness chair and tell me, and tell this Court, that he can't remember such a thing as who instructed him to draw a line through checks, eliminating signatures, and have rubber stamps made, and endorse

them on checks that he can't remember,—that he took it for granted,—I think it goes beyond the grounds of any reason.

Mr. DeLIGNE.—What,—are you making your argument now?

Mr. JACOBS.—No, I am just asking a question.

Mr. DeLIGNE.—I will not wait one minute, at all, on this proposition, because I think that this witness should be protected from such tirades as this. He is testifying here, evidently honestly and fairly, and stating to the best of his ability, I think, what his recollection is of this matter. Now, then, if it is incredible to counsel that he would have made this change under the circumstances, it may not be incredible to the court, so it is,—he says that he believes he was in charge,—

Mr. JACOBS.—(Interposing.) Mr. DeLigne, with all due respect to you,—

Mr. DeLIGNE.—He was in charge of the cashier's office there, of that department,—he knew that this trusteeship was going into effect, but he undertook it, as he says,—he does not remember any directions to make this change, which I think would be, perhaps, a natural thing. [78]

Mr. CROSS.—What are you wanting the Referee to do here?

Mr. JACOBS.—Now, Mr. DeLigne is without, I think, any standing, as far as the witness is concerned; he is not representing the witness, or attempting to argue for or on behalf of the witness, and I am stating this: That where a witness in a

proceeding of this kind comes before the Court and shows, conclusively, that his lapse of memory goes beyond the reasonableness,—

Mr. DeLIGNE.—(Interposing.) Which it does not do.

Mr. JACOBS.—(Continuing.) —to be expected of an intelligent man, such as Mr. Kennerly unquestionably is, occupying the position of importance that he has,—that he is clearly in contempt of court, the same as he would be if he refused to answer the question, and that it is the duty of the referee to instruct this witness to give a more direct and proper answer to the questions, and I ask that the referee so instruct the witness.

Mr. DeLIGNE.—Why, if your Honor please, with all due respect to Mr. Jacobs, I think that his statement here to the Court is entirely inappropriate and wrong, and it is not fair to the witness, and I think that we have a right to object here; we are coming here on behalf of the respondents in this proceeding. These witnesses,—the witnesses that are produced here, are produced by the other side, should be treated fairly, and I don't think that they should be bullyragged and should be told by the Court, or anyone else, that they are in contempt of court,—

Mr. JACOBS.—(Interposing.) I am not attempting to bullyrag the witness.

Mr. DeLIGNE.—(Continuing.) —because they don't make answers that are satisfactory to counsel.

(Testimony of E. W. Kennerly.)

Mr. JACOBS.—I am not attempting to bullyrag the witness. I am asking questions. I have brought the checks here, and I have given every possible consideration to Mr. Kennerly in attempting to refresh his memory, but when a witness has the audacity to sit on that stand and to tell this Court that he does not remember of having received any instructions to change the check, to obliterate signatures on the check, and to go out and buy rubber stamps,—I think it is presuming upon the intelligence of the Court, and I think he should be admonished accordingly, and I will submit it. [79]

Mr. CROSS.—Mr. Jacobs, I shall not admonish the witness at this time. I would ask that you proceed with your examination, and if necessary,—

Mr. SCANNELL.—Your Honor, may I, for your benefit, tell you, that both Mr. Kennerly and I,—

Mr. CROSS.—(Interposing.) Now, just a minute, Mr. Scannell, I am satisfied that Mr. Jacobs would not care to hear from you.

Mr. JACOBS.—He has had his opportunity.

Mr. CROSS.—He is just examining the witness as to his memory upon these particular matters.

Mr. JACOBS.—Q. Now, then, Mr. Kennerly, I am to understand, from your testimony, that the only instructions, or the only information that you ever had, relative to the trusteeship, was the information which you received at that conference on the evening of September fifteenth, in the office of Mr. Cowen, at which meeting there were present

(Testimony of E. W. Kennerly.)

Mr. Scannell, Mr. Henderson, Mr. Cowen and yourself? A. Yes, sir.

Q. All right. And that, presuming upon the information which you received on that particular evening, you went and purchased, of your own accord, a rubber stamp, bearing the word, "Trustee," and stamped that on the checks?

A. Yes, sir.

Q. And also, with a pen,—stroke of your pen, drew a line through the words, "President and Secretary"? A. Yes, sir,

Q. So that the signature to the checks, would now read: "Trustees, George W. Cowen Co., Inc., T. J. Scannell, Trustee," whereas, heretofore they had read: "George W. Cowen, Inc., George W. Cowen, President"? A. Yes, sir.

Q. Did you notify the bank to recognize the change of signature?

A. No, sir. I had no dealings with the bank at all.

Q. You never saw the bank, at any time?

A. Except just in a business way, making deposits, and so on; that is all. [80]

Q. And you never discussed, with any officer, or anyone connected with the bank,

A. (Interposing.) No, sir.

Q. (Continuing.) —any other matter relative to the change in signature on those checks?

A. No, sir. I was never in the bank for any such purpose.

Q. Were you in the bank at any time during

(Testimony of E. W. Kennerly.)

between the fifteenth of September and the second of November?

A. Yes, sir, with deposits.

Q. What was your answer?

A. With the deposits.

Q. With the deposits? A. Yes, sir.

Q. Did you, personally, make the deposits?

A. On most occasions. Sometimes I sent one of the girls.

(Witness continuing.) That he made up the deposit tag during that period of time, stamped in the same manner as the checks, with the word "trustees"; that the pass book was not changed, if he remembered rightly, but that they continued to use the same pass-book; that he had entered the employ of the bank on the 4th of November, and left the employ of the Cowen Company on the 2d of November; that he was employed by Mr. Henderson for the bank and all his dealings relative to his employment for the bank had been with Mr. Henderson personally; that prior to the time he accepted employment with the bank he had not discussed with Mr. Henderson figures, nor at any other time, or at all; that he had not discussed with Mr. Henderson at any time since his employment with the bank the matter of the trusteeship, nor of the funds of the company, nor with anyone else connected with the bank; that he had not discussed it with Mr. DeLigne or any attorney connected with the bank.

(Testimony of E. W. Kennerly.)

Mr. Jacobs exhibited to the witness a number of checks and the witness testified that the figures therein were in his writing; that he had placed the rubber stamp "trustees" on them and also drawn a line through the printed matter "president and secretary"; that he had done this after the checks had been signed by Mr. Scannell; that he did not recall any instance where the signature of Mr. Scannell had been placed on a check after the rubber stamp had been placed thereon, but he could not swear to it, but he did recall that in the majority of instances he got the signatures so as to get the checks signed quickly; [81] sometimes in a hurry to get the checks out and pay the employees they would get the signature at the most opportune time and then finish the check afterwards and then the date and so on, and then the rubber stamp; that he did not recall of ever having any discussion with Mr. Scannell relative to the change in the signature on the checks at all; that he recalled no conversations with Mr. Scannell except where they had a general discussion of the proposed trusteeship; that on the date those first checks were signed, October 2d, he presented the checks to Mr. Scannell for his signature and he made no comments in respect thereto of any kind; that at the time he had the rubber stamp made he had another rubber stamp made bearing the name "J. M. Henderson, Jr., and T. J. Scannell, Trustees," and this latter stamp was placed on all deposit tags.

(Testimony of E. W. Kennerly.)

Mr. DeLigne handed Mr. Jacobs a bank deposit book and Mr. Jacobs exhibited the book to the witness, stating that it apparently was the deposit-book of the Fort Sutter National Bank of Sacramento of Geo. W. Cowen Company and asked if that was the deposit-book which he used for the deposit funds of the George W. Cowen Company during the period of time he was in charge as office manager and the witness replied that it was. The witness testified that the words "trustee accounts" and a particular line designated on page 7 of the deposit-book, were not his; that the line and words were placed there when the first deposit below the line was made from this tag; that he made the first deposit but did not recall whether the line was put in directly after that deposit was made or sometime later; that he recalled seeing that line there every day since it was made there; that he recalled seeing it there subsequently when he made other deposits; that he did not recall having discussed the location with anyone, "No, sir, never"; that he did not know whose handwriting it was and never had any discussion with Mr. Cowen about the deposit-book or the notation therein. [82]

The hearing then adjourned until February 24th, 1921. The hearing was resumed on Thursday, February 24th, 1921, and Mr. E. W. Kennerly was recalled by Mr. Jacobs. He further testified as follows:

(Testimony of E. W. Kennerly.)

Mr. Jacobs showed a paper to the witness purported to be a carbon copy of a letter dated September 20, 1920, and addressed to the Cadet Hosiery Company, Second Street and Allegania Avenue, Philadelphia, Pennsylvania, which read as follows:

"Gentlemen: In answer to your recent communication permit me to inform you that the above business has been turned over to Mr. J. M. Henderson, President of the Sacramento-San Joaquin Bank, and myself as trustees. The trusteeship, I am sure, will meet with the approval of the creditors of the concern because of the reorganization planned by Mr. Henderson. A personal representative will call on you very shortly after receiving this letter, explaining the situation in detail. I am sure that, under the conditions which obtain, you will agree that the present solution is for the best interests of all concerned. Thanking you for your courtesy and trusting that your future relations will prove mutually advantageous, I am, Very Truly Yours, ———" and the word trustee for Geo. W. Cowen, Inc., with the notation in initials below, "T. J. S.:H." The witness testified that letters addressed to some of the creditors were written and so far as he could remember were like the one just read; that he did not see Mr. Scannell's signature but he saw the carbon copy. Mr. Jacobs then withdrew Mr. Scannell from the stand temporarily and recalled John Locketti, who was sworn and testified substantially as follows:

(Testimony of E. W. Kennerly.)

That his present occupation is that of receiving teller in the Sacramento-San Joaquin Bank. In September, 1920, he was a bookkeeper in that bank. He recalled the account that Geo. W. Cowen Co., Inc., had with the bank during the month and thought that he personally made all the entries relative to that account during that month. He thought he was on the books then. Mr. Jacobs showed the witness what purported to be a copy of the George W. Cowen account during the month of September, 1920, [83] and two sheets which appeared to be ledger sheets, and asked if they were not copies of the original ledger sheets, to which the witness replied that they were.

Mr. Jacobs stated that for the purpose of identification he was marking the sheets "Sheet No. 1" and "Sheet No. 2."

Mr. Jacobs called the attention of the witness to Sheet No. 1, at the bottom of which he stated there appeared to be the entry which after the date September 23d, indicated under the balance, $2,030.09, and asked the witness if he recalled making an entry of that amount in the original ledger at that time. The witness replied that he did not recall it.

Mr. Jacobs asked from what record those entries were made. The witness replied, "They either come through the windows or the clearing house. The checks come from the clearing house and the windows and just deposits from the windows. Mr. Jacobs showed the witness three deposit slips

(Testimony of E. W. Kennerly.)

which show deposits made in the Fort Sutter National Bank under date of September 24th, 1920, and September 23d, 1920, marked "Trustees" and the name, part of which, apparently, had been torn off from the top. For the purpose of identification they were numbered "3," "4" and "5," and were identified by the witness as deposit tags referring to deposits made in the Geo. W. Cowen Company account.

Mr. Jacobs then showed the witness a copy of ledger sheet marked "No. 2" for identification and asked the witness if they had entries on the ledger sheet representing those deposits, to which the witness replied "Yes," and at the request of Mr. Jacobs the witness read those entries from the ledger sheets as follows: $630.31, $223.01, $2,030.90, and continuing testified that the last amount, $2,-030.90 was the amount indicated on the deposit slip marked No. 5, and on that slip there appeared to be the initial "K" indicating that Mr. King made out that slip. Below that is the word "new" in pencil. The witness said that he could not be sure whether the word "new" was on the tag the time the deposit was made or not, but that if he wasn't sure he would have taken it back; that the word "new" [84] indicated that it was a new account and a new sheet was made out; that the three slips shown him by Mr. Jacobs were of deposits to be placed to the names of J. M. Henderson, Jr., and T. J. Scannell, Trustees of Geo. W. Cowen Co., Inc., and that he made out a ledger

(Testimony of E. W. Kennerly.)

account in the names of J. M. Henderson, Jr., and T. J. Scannell, Trustees for Geo. W. Cowen Co., Inc., and that he made out a ledger account in the name of J. M. Henderson, Jr., and T. J. Scannell, Trustees for Geo. W. Cowen Co., Inc. This sheet afterwards was taken out and a new sheet was substituted for it in the name of "The George W. Cowen Co., Inc." The witness stated he thought he did this under instructions from Mr. Mayhood; that he remembers stating in the presence of Mr. Jacobs and Mr. DeLigne to Mr. Cross this morning that he removed the sheets at the personal instruction of Mr. Henderson, but it seemed to him that he remembered that Mr. Mayhood came to him and directed him to make over a new sheet.

Question by Mr. JACOBS.—Didn't you state to Mr. Cross, Mr. De Ligne and myself, this morning that you removed that account, and changed it from the ledger sheet, making out a new sheet, changing it from the names of J. M. Henderson, Jr., and T. J. Scannell, Trustees of George W. Cowen Company, to the George W. Cowen Company, Incorporated? A. Yes, sir.

Q. Did you do that? A. Yes, sir.

Q. Under whose instructions did you do that?

A. I think Mr. Mayhood told me.

Q. Now, do you recall that you stated to Mr. Cross, Mr. De Ligne and myself, this morning, that you did that under the personal instructions of Mr. Henderson?

A. I remember of saying Mr. Henderson, and

(Testimony of E. W. Kennerly.)

then I said Mr. Mayhood,—I wasn't quite sure a the time.

Q. Don't you recall that you positively stated that Mr. Henderson told you?

A. Yes, I am pretty sure I did.

Q. Yes. Now, have you talked this over with anyone since you had the discussion with myself and these other two gentlemen this morning?

A. No, I haven't. [85]

Q. You haven't talked it over with any of the officials of the Bank?

A. No, sir; I don't think I have.

Q. Now, this morning, you were sure it was under Mr. Henderson's instructions that you made that change? A. Yes, sir.

Q. Why is it that you are not so sure, now?

A. Well, it seems to me like I remember Mr. Mayhood came to me one night and told me that he didn't want those names to appear on the sheet, to make over a new sheet.

Q. But you do recall that, this morning, that you said that Mr. Henderson instructed you to make a change? A. Yes, sir.

The witness further testified that he thought he had personally thrown away the original ledger sheet about three or four months after the account was made under the name of T. J. Scannell and J. M. Henderson, Jr., Trustees; that during the entire time after the changing of the account from George W. Cowen Company to J. M. Henderson, Jr. and T. J. Scannell, Trustees for George W.

(Testimony of E. W. Kennerly.)

Cowen Company it continued to show the names of J. M. Henderson, Jr., and T. J. Scannell until he substituted the new sheet showing the account again in the name of Geo. W. Cowen Co., Inc. [86]

Mr. Jacobs showed the witness page No. 2 and drew his attention to the fact that the page was not completed; that there was quite a considerable space wherein new entries should be made and asked him the reason for abandoning the use of the particular page.

The witness answered that the only reason was that the account was closed and that when they closed an account it was usually brought over to a new page when it was reopened. These entries indicate that the account was closed September 30th. The balance in the account on September 30th, according to the sheet marked No. 2 is $4,-112.28. On October 1st, according to sheet No. 3, it was $547.16. The account appears to have balanced on September 30th. In other words, it appears that a check for $4,516.43 was charged against the account to balance a deposit of $404.15 made on September 30th, and the balance on hand of $4,112.28. The account was renewed by a deposit made on that day of $673.46; that he did not know what the withdrawal of $4,516.43 represented.

Mr. Jacobs showed to the witness a number of slips, the first of which he marked with the number "8" for identification, which read as follows: "The Fort Sutter National Bank, Sacramento, California. Advice of charge. September 30, 1920.

(Testimony of E. W. Kennerly.)

This is to advise you that we have this day charged your account in this bank $4,516.43, as follows: Interest on $15,000.00 note to 9–8–20, $155.00; to apply on note $4,361.43—total, $4,516.43. Geo. W. Cowen, Inc. (Note below:) Approved by R. A. Cashier."

The witness testified that this was the charge slip from which that entry referred to under date of September 30th, of $4,516.03 was made but that he did not know whether that amount was then transferred to the credit of the Fort Sutter National Bank on that date.

Mr. Jacobs called the witness' attention to sheet No. 7 under date of October 13th, an entry in the amount of $5,017.26. The witness testified that it represented a charge against the account of Geo. W. Cowen Company. On a similar slip marked No. "9" for identification, dated October 13th, 1920, the words "this is to advise you that we have this day [87] charged your account in this bank $5,-007.20, as follows: to apply on note, Geo. W. Cowen Co., Inc., approved by Robinson, A. Cashier," was the slip from which the charge was made against that account. A similar slip marked for purpose of identification No. "10," dated October 15th, 1920, was the slip from which an entry was made in the ledger account of the sum of $173.08 on the same date. This slip read "this is to advise you that we have this day charged your account in this bank $173.08 as follows: to apply on note Geo. W. Cowen, Inc., approved by A. Robinson, cashier."

(Testimony of E. W. Kennerly.)

A similar slip was shown the witness by Mr. Jacobs and marked for purpose of identification No. "11" and which is dated October 16th, 1920, which stated: "this is to advise you that we have this day charged your account in this bank $518.03, as follows: to apply on note, Geo. W. Cowen, Inc., approved by Robinson, A. cashier."

The witness testified that he found a debit to the account in that amount on October 16th, 1920, and that it was from that particular slip that the entry was made.

A similar slip was shown the witness by Mr. Jacobs marked No. "12" for the purpose of identification, dated October 19th, and reads: "this is to advise you that we have this day charged your account in this bank $738.25, as follows: to apply on note interest to 10–8–20, $69.20; principal $669.25—total $738.25. Geo. W. Cowen Co., Inc." The witness testified that he found a debit charge in this amount on October 25th, 1920, and that it was from this slip that the debit charge on that account was made. The witness admitted that it was rather an unusual circumstance to be instructed to remove and destroy a [88] ledger sheet and substitute a new sheet in an account in the bank; that he had been working in the bank two and a half years; that he did not recall on any other occasion that he had substituted a new ledger sheet and destroyed the old one unless he happened to tear it in the machine in some way, or (here the

(Testimony of E. W. Kennerly.)

witness was interrupted by Mr. Jacobs with a question). [89]

The witness testified that he was sure that it was Mr. Mayhood who gave him the instructions, and that Mr. Henderson never personally instructed him to do so, and that when he told Mr. Cross in the presence of Mr. Jacobs and Mr. DeLigne that Mr. Henderson instructed him to remove the sheet, he was rather confused about the thing; that he distinctly remembered of Mr. Mayhood coming to him one night, about four or half-past four, and telling him to do so.

Mr. DeLIGNE.—We can save some time on this question, as Mr. Henderson says that he did not instruct this boy, but he did instruct Mr. Holland, the cashier, that the account should never have been in the name of himself and Mr. Scannell as trustees, and that it should be changed; so there is no question about that. While Mr. Henderson did not tell the witness directly, he is responsible for the change.

On cross-examination by Mr. DeLigne the witness testified that the destruction of the original sheets and the substitution of new sheets occurred three or four months after the account was opened; to the best of his recollection, about three months after the account was opened, he was pretty sure.

Mr. JACOBS.—It is admitted that the deposit tags introduced in evidence, and marked one, two and three for identification,—and then I will identify with the numbers and give them to you,—or

the deposit tags showing the deposits made between the period commencing September the twenty-fourth, and up to the time of the appointment of Mr. Henderson as receiver in the bankruptcy proceedings?

Mr. DeLIGNE.—Yes. [90]

Mr. JACOBS.—And that each of those tags bears the notation on top thereof, either by use of a rubber stamp, or in writing, of the designation: "Deposited by J. M. Henderson, Jr., and T. J. Scannell, Trustees, George W. Cowen Co."; that the deposits, as shown on those particular tags, were entered in that particular account by this gentleman, Mr. Locketti, on the dates noted on the particular account.

Mr. DeLIGNE.—I think that is correct. I will concede it,—admitted.

There was then admitted in evidence on motion of Mr. Jacobs the following exhibits:

TRUSTEES' EXHIBIT No. 1 is a ledger sheet in the name of Geo. W. Cowen Co., Inc., in account with The Fort Sutter National Bank, showing balance brought forward September 15th, 1920, of 1,046.83 and a deposit of $434.68, making a total balance of $1,481.51, and deposits and withdrawals made on various dates between September 15th and September 24th, the last item showing a balance of $2,030.90 on September 23d, and a check against the account on September 24th, 1920 of $2,030.90.

TRUSTEES' EXHIBIT No. 2 is a ledger sheet in the name of Geo. W. Cowen Co., Inc., in account with The Fort Sutter National Bank, showing balance brought forward on September 24th, 1920 of $630.31, and deposits and withdrawals practically daily between September 24th, 1920, and September 30th, 1920, and on September 30th, 1920, the old balance of $4,112.28; checks and withdrawals on [illegible] same day—$4,516.43; deposits $404.15 and a balance of nothing. [91]

TRUSTEES' EXHIBIT No. 3 is a Deposit Tag made out in the name of J. M. Henderson, Jr., and T. J. Scannell, Trustees, Geo. W. Cowen Co., Inc., dated September 24th, 1920, showing a deposit of $630.31.

TRUSTEES' EXHIBIT No. 4 is a Deposit Tag made out in the name of Trustees, Geo. W. Cowen, Co., Inc., dated September 23d, 1920, showing a deposit of $223.01.

TRUSTEES' EXHIBIT No. 5 is a Deposit Tag in the name of Trustees, Geo. W. Cowen, Co., Inc., dated September 24th, 1920, showing a deposit of $2,030.90.

TRUSTEES' EXHIBIT No. 6 is a Bank-book on the face of which is printed The Fort Sutter National Bank, in account with Geo. W. Cowen Co., Inc., the name "Geo. W. Cowen Co., Inc.," being stamped by a rubber stamp. At the top of the first pages of the book are printed the words, "Dr. The Fort Sutter National Bank, in Acct. with Geo. W. Cowen Co., Inc., Cr. (the name "Geo. W. Cowen

Co., Inc.," being stamped). The first entry is April 2d, 1920, of a deposit of $180.15. The book shows deposits practically daily, between April 2d, 1920, and December 14th, 1920. Below an entry of a deposit made on September 21st, 1920, a line in ink is drawn across the face of the page and above the line is written in ink the word "trustee," a/c. The last entry is dated December 14th, 1920, and shows a deposit of $658.77.

TRUSTEES' EXHIBIT No. 7 is a ledger sheet in the name of Geo. W. Cowen Co., Inc., in account with The Fort Sutter National Bank, showing a balance brought forward of $673.46, and deposits and withdrawals practically daily between October 1st, 1920, and October 20th, 1920, and showing on November 15th, 1920, a new balance of $4,167.58. [92]

TRUSTEES' EXHIBITS 8, 9, 10, 11, 12 and 13 are Notices or Advice of Charge in the following form:

THE FORT SUTTER NATIONAL BANK
Sacramento, California

Date

———

ADVICE OF CHARGE

This is to advise you that we have this day charged your account in this bank $——
As follows:

_____

_____

_____

_____

To GEO. W. COWEN CO., INC.

_____

Address: _____

_____ _____

Approved by _____

Cashier.

TRUSTEES' EXHIBIT No. 8 is dated September 30th, 1920, and the amount charged is $4,516.43.

TRUSTEES' EXHIBIT No. 9 is dated October 13th, 1920, and the amount charged is $5,007.26.

TRUSTEES' EXHIBIT No. 10 is dated October 15th, 1920, and the amount charged is $173.18.

TRUSTEES' EXHIBIT No. 11 is dated October 16th, 1920, and the amount charged is $518.03.

TRUSTEES' EXHIBIT No. 12 is dated October 19th, 1920, and the amount charged is $738.25.

TRUSTEES' EXHIBIT No. 13 is dated October 25th, 1920, and the amount charged is $1,508.16.

Each of said Notices of Advice of Charge is addressed to Geo. W. Cowen Co., Inc. [93]

TRUSTEES' EXHIBIT No. 14 is a ledger sheet in the name of Geo. W. Cowen Co., Inc., in account with The Fort Sutter National Bank, and shows on November 16th, 1920, a balance brought forward of $4,167.58, and deposits and withdrawals practically daily between November 16th, 1920, and December 23d, 1920, and showing a balance on December 23d, 1920, of $105.05.

TRUSTEES' EXHIBIT No. 15 is a ledger sheet in the name of Geo. W. Cowen Co., Inc., in account with The Fort Sutter National Bank, showing a balance brought forward on December 27th, 1920, of $105.05, and a balance on December 28th, 1920, of $64.97.

TRUSTEES' EXHIBITS Nos. 16, 17 and 18, being Signature Cards, have heretofore been set out.

TRUSTEES' EXHIBIT No. 19 is a Trust Agreement, as follows:

Trustees' Exhibit No. 19.

AGREEMENT MADE THIS 15th day of September, 1920, by and between Geo. W. Cowen Co., Inc., party of the first part, J. M. Henderson, Jr., and Thomas Scannel, of Sacramento, California, parties of the second part, and the creditors of the Geo. W. Cowen Co., Inc., parties of the third part,

WHEREAS Geo. W. Cowen Co., Inc., is unable to meet its obligations, and, whereas Geo. W. Cowen Co., Inc., has resolved through its Board of Directors that it is for the best interests of the Company to enter into the within agreement, and, whereas, the said J. M. Henderson, Jr., and Thomas

Scannel have agreed to accept this trust and act as the Trustees for the benefit of the creditors of said Geo. W. Cowen Co., Inc., and, whereas, the creditors [94] of the said Geo. W. Cowen Co., Inc., have deemed it advisable and for the best interests of all the creditors to enter into the written agreement;

NOW THEREFORE this agreement:

First. In consideration of the covenants herein contained and other good and valuable considerations, the Geo. W. Cowen Co., Inc., hereby conveys, transfers and sets over unto the said J. M. Henderson, Jr., and Thomas Scannel all the rights, title and interest of the said Company in and to its assets of every nature and description, including the merchandise owned by the said Company, its accounts receivable, its cash in bank, the fixtures of its place of business and all other property of every kind in any wise relating to its business,

In trust, nevertheless, as follows:

Second. J. M. Henderson, Jr. and Thomas Scannel hereby accept the trust herein created and agree to act as trustees to the best of their ability, to the end that the said creditors shall be paid their respective indebtedness in full, during the life of the trust and as soon as the business conducted by the said trustees shall warrant the payments thereof.

Third. The trust shall continue for a period of one year from the date of these presents, and the said trustees shall receive no compensation for their services as trustees with the exception, how-

ever, that Thomas Scannel shall be entitled to receive as and for his compensation as managing trustee a salary not to exceed the sum of Three Hundred Seventy ($375.00) Dollars [95] a month, now received by him in his capacity as manager of the business of Geo. W. Cowen Co., Inc.

Fourth. The trustees agree to conduct the said business to the best of their ability and to the best interest of the creditors and to pay to the said creditors as soon as the business shall warrant, the respective claims of the said creditors. The said trustees shall have full power to borrow money to carry out the intention of this agreement. Should the business conducted by the said trustees or the assets hereby conveyed to them not be sufficient to pay the claims of the creditors of the said corporation, the trustees agree, on the expiration of the trust or other sooner termination thereof to pay to the creditors the percentage of the assets remaining in their possession *pro rata*, to each creditor, in the respective amount of the claims.

Fifth. The trustees agree to engage the services of Mr. and Mrs. Geo. W. Cowen to assist them in the conduct of the said business and agree to pay them such compensation as in their sole judgment shall be a fair and reasonable amount for the service rendered by them.

Sixth. It is intention of this agreement that if in the opinion of the trustees it shall become expedient for the trustees to dispose of the assets and other property of the corporation in bulk

rather than in the regular course of business, the said trustees shall have full power and authority to convey said property in bulk and to dispose of such assets to a [96] purchaser at the best price obtainable. It is agreed and understood, however, that in the event that if it shall become expedient to dispose of the assets in bulk the said trustees shall submit in writing to Geo. W. Cowen, a document advising him that an offer has been made for the said property which is acceptable to the said trustees, and that the said Geo. W. Cowen may exercise his option to purchase said property within a period of Ten (10) days from the date of said notice, at a price equal to the offer made by such *bona fide* purchaser. Should Geo. W. Cowen not exercise his option of purchase upon the terms herein stated, the trustees shall have the power to dispose of the said property to the said proposed purchaser upon any terms as in their judgment they shall deem proper and advisable, and to the best interest of the creditors.

Seventh. The trustees agree that during the life of the trust they will insure the assets and property in their possession and control, against loss by fire in such insurance Companies as to them shall be proper.

Eighth. The trustees shall be saved harmless from any personal liability by reason of their conduct of the said business or their disposition of its assets and property and any act performed by the said trustees and considered by them for the best interest for the creditors, shall be final and

conclusive and shall not in any wise affect the personal credit or standing of the trustees in their exercise of their said judgment. [97]

Ninth. The trustees shall have the privilege of continuing the trust herein created for a period of one year from the date of these presents, at the end of which time it shall be their duty to reconvey said property back to the said Geo. W. Cowen Co., Inc., provided the creditors shall have been fully paid, and in that event they shall be discharged from any further performance of the covenants contained in this trust agreement. If at any time during the year the creditors shall have been fully paid, the trustees shall return the property remaining in their hands to the Geo. W. Cowen Co.

Tenth. The creditors of the said Geo. W. Cowen Co., Inc., hereby consent to the execution of the within trust on terms herein contained and agree to extend the time of payment of all indebtedness to date to them, whether due or not due, for a period of one year from the date of this agreement and agree to defer taking any action in the form of suit or otherwise to enforce the payment of said indebtedness during the said period of one year, and the said creditors agree that this agreement may be treated as an agreement on their part to extend time of payment of their indebtedness for the said period of time and further agree that this instrument may be used as their assent to any composition agreement that may be executed, should bankruptcy involve the Geo. W. Cowen Co., Inc., at any time from the date of these presents

to the date of the expiration or sooner termination of this trust.

Eleventh. This agreement may be executed on several sheets, each of which shall be considered a part thereof. [98]

IN WITNESS WHEREOF, Geo. W. Cowen Co., Inc., has caused these presents to be executed by its authorized officers and the parties of the second and third parts have signed this instrument the day and year first above written.

GEO. W. COWEN CO., INC.
(Signed) By GEORGE W. COWEN,
President.
[Seal] (Signed) F. E. MICHEL, Jr.,
Secretary.
(Signed) J. M. HENDERSON, Jr.
Trustee.
(Signed) T. J. SCANNELL,
Trustee.
FORT SUTTER NATIONAL BANK,
Sacramento, Calif.,
Creditor.
(Signed) GEO. S. BULLOCK,
Cashier.

State of California,
County of Sacramento,—ss.

On this 15th day of September, in the year of our Lord one thousand, nine hundred and twenty before me, S. H. Jones, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared George W.

Cowen, known to me to be the President of the corporation that executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[Seal] (Signed) S. H. JONES,
Notary Public. [99]

Creditor.	Address.	Amount.
Fort Sutter National Bank Geo. S. Bullock, Cashier	Sacramento, Cal.	$15,000.00
Muller & Raas Co.	San Francisco	103.76
Butler, Schutze Co. Per I. Johnson		391.06
Wm. Hoff		269.25
Moss Bros.		183.50
Max Greenberg Co. Per Max Greenberg		456.71
. Segall		273.00
he Sacramento Union By Sam Miles, Bus. Mgr.		490.83
. S. Crocker Co., Inc. T. H. Holcomb, Manager		420.71
he Sacramento Store By L. H. La Rash, B. M.		213.18
hn Breuner Co.		387.60
mes McClatchy & Co. Per S. J. McClatchy, Business Manager	Except lines 7–8–9–10, page 4.	958.66
Laughlin Draying Co. By C. M. Hanrahan, Sec.		266.50

0]

TRUSTEES' EXHIBIT No. 20 is Cancelled Checks hereinabove set out.

TRUSTEES' EXHIBIT No. 21 is Deposit Tags in the following form:

Trustees' Exhibit No. 21.

Depositors are requested to specify Banks upon which checks are drawn.

DEPOSITED BY

_____

WITH

THE FORT SUTTER NATIONAL BANK

of Sacramento.

Sacramento, Cal. ———, 19—.

In receiving checks on deposit, payable elsewhere than in Sacramento, this bank assumes no responsibility for the failure of any of its direct or indirect collecting agents, or loss of items in mails and shall only be held liable when proceeds in actual funds or solvent credits shall have come into its possession. Under these conditions items previously credited may be charged back to the depositor's account. In making this deposit, the depositor assents to the foregoing conditions.

	DOLLAR	CENTS
GOLD		
SILVER		
CURRENCY		
CHECKS		

ten of which bear various dates between August 26th and September 22d, 1920; are in the name of Geo. W. Cowen Co., Inc., and show deposits made on different days during said period; three of which, dated September 25th, 27th and 28th, 1920, [101] are in the name of Trustees, Geo. W. Cowen Co., Inc., the word "Trustees" being written in ink above the stamped name, "Geo. W. Cowen Co., Inc.," thirty-four of which, bearing various dates between September 29th, 1920, and November 5th, 1920, are in the name of J. M. Henderson, Jr. and T. J. Scannell, Trustees Geo. W. Cowen Co., Inc., the words "J. M. Henderson, Jr. and T. J. Scannell, Trustees Geo. W. Cowen Co., Inc., being stamped on the deposit tags, except that one of said tags shows the name of J. M. Henderson, Jr., and T. J. Scannell, Trustees Geo. W. Cowen Co., Inc., written in pen. These tags show deposits made on various days during the dates above mentioned; twenty-six of which, bearing various dates between November 6th, 1920, and December 14th, 1920, are in the names of "J. M. Henderson, Jr., Receiver, Geo. W. Cowen Co., Inc.," or in the name, "Receiver," Geo. W. Cowen Co., Inc., and one deposit tag in the name of Geo. W. Cowen Co., Inc., dated December 6th, 1920, is without the word "Receiver" or "Trustee," or "Henderson" or "Scannell." The last mentioned deposit tag shows a deposit of $16,835.83. [102]

Testimony of George S. Bullock.

Mr. GEORGE S. BULLOCK was called by Mr. JACOBS, duly sworn and testified as follows:

That he was connected with the Fort Sutter National Bank during the month of September, 1920, and prior thereto, as cashier; that he continued with the bank until October 15th, and did not function as cashier of the bank after September 28th.

Mr. Jacobs showed the witness three deposit tags which he marked Trustees' Exhibits Sixteen, Seventeen and Eighteen, and asked the witness if he could identify them. The witness identified the one marked "Number Sixteen" and the one marked "Number Seventeen."

The witness testified that the words written across the cards "Cancelled September twenty-four, 1920, G. S. B.," was his notation, and that the notations on the two cards marked Sixteen and Seventeen purported to cancel the signature of George W. Cowen, as President, to issue checks of the George W. Cowen Co., Inc., that followed the cancellation the signature of Mr. Cowen was to be refused on checks. You see, the fact of the matter is, we cancelled all the signatures. I do not know whether any signature cards were made out and signed after these were cancelled; that the circumstances attending the cancellation of the signatures were: there was a lot of post dated checks drawn and we turned the checks back and then cancelled the signature; that he did not know

(Testimony of George S. Bullock.)

under whose instructions he cancelled those signatures or whether he did that on his own initiative, or whether the matter was taken up. There were some Eastern creditors out here at the time, I think, about that time they were here, and they came in and said something about it; that he may have taken it up with Mr. Henderson, but was not sure of that, and he may have done it on his own initiative. It is not rather unusual to cancel a signature of customers. If we wanted to close the account we would naturally cancel the checks; that he thought it would be necessary to close an account after you turn back a man's check; that the account was closed on that date.

(The witness continuing:) That he did not know whether or not the account was closed on the date of September 24, 1920, and that he did not [103] know under whose instructions the signatures were canceled; that he could not remember; that if the cancellation was under his own initiative, he would not necessarily recall the circumstances attending it; that he was about to leave the bank and his mind was not on the work; that Mr. Henderson was president during all of that time.

Question by Mr. JACOBS.—And were you, personally, working under Mr. Henderson?

A. Well, I was the cashier of the bank, the Executive Officer of the bank, and had that as part of my business to cancel the signatures necessary.

Q. And your duties were such that you were

(Testimony of George S. Bullock.)

working under Mr. Henderson's personal instructions; is that correct?

A. Well, I was working with the Board of Directors. I was the Executive Officer of the Bank.

Q. Well, now, in a matter of this importance, in a matter of the cancellation of signatures, who would instruct you if you were not working under your own initiative?

A. Why, I don't know how to answer that question. I, as cashier of the bank, quite a long while, and thirty-one years of banking experience, and I have cancelled lots of signatures on my own initiative.

The witness further testified that he was cashier of the bank, the executive officer of the bank, and had [104] that as part of his duties to cancel the signatures necessarily.

Mr. Jacobs asked the witness if his duties were such that he was working under Mr. Henderson's personal instruction. The witness replied that he was working with the Board of Directors; that he was the executive officer of the bank.

The witness was asked by Mr. Jacobs if in a matter of the cancellation of signatures, who would instruct him, if he were not working under his own initiative, to which the witness replied that he did not know how to answer the question, as he was cashier of the bank quite a long while, had had thirty-one years of banking experience and had cancelled lots of signatures on his own initiative.

(Testimony of George S. Bullock.)

Continuing, the witness stated that when he cancelled a man's signature, his account was closed ordinarily; sometimes a cancellation meant a change of signatures; that at the time these signatures were cancelled he was under the impression that there was a new card given and a new signature called for; that he was not necessarily familiar with the accounts of the bank, and if he wanted the balance on the ledger, he would have one of the bookkeepers look for the balance, and doubted whether he had ever seen Cowen's account or looked at Cowen's account on the books, and that he did not know that there was an account in the bank in the name of J. M. Henderson and T. J. Scannell, Trustees of George W. Cowen Co., between September 24th and the day he severed his connection with the bank; that he did not think he had instructed anyone to open that account; was quite sure that he had not; that he remembered the cancellation of the signature card; [105] that it was on account of post dated checks; that the post-dated checks came into the bank through the regular course of business, and they had nothing to do but turn them back; that they turned back anybody's checks that were post dated; that he never had any conference or conversation with Mr. Cowen to the best of his recollection; that he did not think he had any conversation with Mr. Henderson regarding the question at all; he was pretty sure of that; that he did not remember of

(Testimony of George S. Bullock.)

having had any conversation with any other official of the bank regarding the account at that time, but he did remember the incident of the post dated check; that he may have discussed the account with reference to the post dated checks and cancellation of the signature with Mr. Robinson; that they had discussed other business in a general way, and he thought while he was there there was one charge made against the account, applying the amount on the note, but he was not sure about that.

Mr. Bullock was temporarily withdrawn from the stand by Mr. JACOBS. Mr. H. H. ROBINSON was called by Mr. Jacobs and sworn as a witness.

Testimony of H. H. Robinson.

The witness testified that he was employed in the Fort Sutter National Bank during the months of September and October, 1920, and severed his connection with the bank November 1st, 1920. During the month of September, 1920, he was Assistant Cashier. He remembered the account of George W. Cowen Co., Inc.; that several charges were placed against the accounts; that he believed there was an application made for a new loan by George W. Cowen Company early during the year 1920, and a discussion between the officials; that he did not recall ever having a discussion regarding the loan, at [106] which Mr. Henderson was present; he thought there was an applica-

(Testimony of H. H. Robinson.)

tion for another loan which was refused, and there was a change made in the account at that time; that there was some difficulty regarding post dating of checks and turning back of checks, as he recalled there was a trusteeship and a new account opened; that he did not recall ever having a discussion with any other officials relative to the new account, other than the debit charges that he placed against the account; that he recalled having conversed with Mr. Bullock as to this account regarding those debit charges; that Mr. Bullock knew that he had placed the debit charges against the account and he did that for his own protection; the debit charges were placed against his account and credited on the note of George W. Cowen Company; that the debit charges referred to are those shown by exhibits marked eight, nine, ten, eleven, twelve and thirteen; that the first of these exhibits "A," bearing the notation "Approved by R," was approved by him; that was his initial, and all the others, except the final one on October 25th, were approved by him; that he couldn't say at this time whether the final one was approved by him, but that was the mode of procedure to charge the account as the money was on the account; that Mr. Henderson authorized the charge made on September 30th.

(In answer to a question by Mr. JACOBS:) "And then Mr. Henderson, on that date, instructed you to debit the account on the books with the amount of $4516.43?

A. Yes, sir, that is true.

(Testimony of H. H. Robinson.)

Q. Did you have any discussion with Mr. Henderson as to the account at that time?

The witness testified that he did not know whether he took it up with Mr. Henderson regarding the charge, but he took it up with Mr. Bullock, while he was there, and Mr. Holland, who succeeded him as manager in charge of the bank, regarding the bank's authority to have a banker's lien on funds after there was some difficulty in the corporation; that he knew at that time that the account appeared in the name of J. M. Henderson and T. J. Scannell, trustees, and that he discussed with Mr. Holland whether or not the bank had the authority [107] to transfer the funds; Mr. Holland expressed the opinion that inasmuch as Mr. DeLigne was the counseller for the bank, no doubt it was a legal charge; that Mr. Henderson told him to make the debit charge against the Cowen Company and apply it on the note; that he took the matter up with Mr. Holland as to the legality of the charge; that most of the charges were made during Mr. Holland's period and while Mr. Holland was actively in charge; that Mr. Bullock might have been present at the first few charges, but could not say; that after the first charge he believed Mr. Henderson rang up a few times and asked if he had charged the account as instructed; that his instructions were to charge the account with the amounts to exercise your Banker's Lien, or words of similar effect, if not exact.

(Testimony of H. H. Robinson.)

On cross-examination the witness testified that Mr. Henderson told him such moneys as were deposited in the account should be credited to the account and charged with the separate charge slips to show the transaction; that he had no discussion with Mr. Henderson about any trusteeship; that he did not know whether there was a written agreement or what sort of trusteeship; he knew there was a financial difficulty there, and Mr. Henderson was to take charge of the affairs of the company; that was just general knowledge, and he never talked with Mr. Henderson about it; the only conversations he had with him were about charging the accounts, that is, crediting on the note and charging the account.

Testimony of F. H. King.

Mr. F. H. KING was called by Mr. JACOBS and sworn as a witness, and testified as follows:

That his present occupation was that of Receiving Teller in the Merchants National Bank; that he [108] was employed by the Fort Sutter National Bank during the year 1920, up to the 15th of December, as Receiving Teller; that he remembered the account of the George W. Cowen Company.

Mr. Jacobs showed the witness three deposit tags, marked Trustees' Exhibits Three, Four and Five, and asked the witness if he could identify the tags. The witness answered that there was no particular identification he could give on the tags, other than as in the capacity of Receiving Teller

(Testimony of F. H. King.)

he accepted deposits; that the "K" on the tags was in his own writing, and that he knew that on those dates the moneys represented by the tags were deposited to the accounts as stated by them in the name of J. M. Henderson, Jr., and T. J. Scannell, trustees of Geo. W. Cowen Company; that the word "new" on Trustee's Exhibit Number Five looked like his handwriting, but he could not swear to it; he guessed it was his; that word indicated that it was a new account; that would show up to that time there was no account on our ledgers in that name; that he could not recall who instructed him, but he could testify that if he wrote "new" on the account, he had no authority to open new accounts; as a rule, all new accounts are O. K.'d by officals of the bank; that he had no recollections as to being instructed to open this as a new account.

Testimony of George S. Bullock (Recalled).

Mr. BULLOCK was recalled and testified: That he could affirm Mr. Robinson's testimony, only he would like to correct it to this extent that he, the witness, had testified to all he knew about cancelling the signature, but as to conversations regarding the legality of making the charges of offset to the account as a banker's lien, he remembered that Mr. Henderson and he had had [109] that up, and he thought at one time he spoke to Mr. Holland; the first charge was put there before Mr. Holland was there, and he remembered having a

(Testimony of George S. Bullock.)

conversation with Mr. Holland, and it was under the instructions of the attorney, etc., and that was just general remarks, that was all, there was nothing official about it; that he had no recollection of the new account in the name of J. M. Henderson, Jr., and T. J. Scannell, as trustees of the George W. Cowen Company; that wouldn't come before him as a rule; if he had happened to be out in the corridor, or something like that, he might have O. K.'d it, but he did not remember that at all, in fact he didn't think he heard anything about it; that Mr. King was correct in the statement that new accounts could only be opened under instructions from an official of the bank; but that he gave no instructions as to the opening of that account; that he did not recall of having signed any signature cards subsequent to this date, indicating in what manner the account had been handled, but he was under the impression that there were new signatures furnished there; that his recollection was refreshened,—his impression was that when he cancelled those cards, or gave Mr. Scannell a blank signature card to have filled out, he was under the impression all the time that that signature was on file there; that he did not recall the designation of the account whether or not it was J. M. Henderson, Jr., and T. J. Scannell, trustees of George W. Cowen, Inc.; he did not see the signature, if there was a signature, after that, it would not come to him, anyway; it would come to one of the Tellers in the bank, but it is a fact that some official of the bank would

(Testimony of George S. Bullock.)

have to instruct that account to be credited in the manner as indicated, before it would go upon the books in any way.

On cross-examination by Mr. DeLIGNE, the witness testified that in order to change the account of the George W. Cowen Company to J. M. Henderson, Jr., and [110] T. J. Scannell, Trustees, authority from the Cowen Company would have been necessary; that he did not remember whether there was any authority from the Cowen Company or not, by which that change was made; it was customary, however, and that he would not make a change like that without authority; that to the best of his belief, there was such authority from the Cowen Company; it might not have come to him; that at the time of discussing the matter of charging the account of the Cowen Company and crediting the amount to the note, nothing was said about the account being in the names of the trustees, that he did not know at that time that the account was in the names of the trustees, or that the set off was to be for moneys in the names of the Trustees.

Redirect Examination by Mr. JACOBS.

The witness testified that the cancellation of the signatures was on his own initiative; that he was pretty sure that he gave Mr. Scannell a card, in fact he knew he did; a blank signature card to have filled out with the proper signature, so that they could draw against the account; that there

(Testimony of George S. Bullock.)

was a letter or something written to the bank, authorizing this man Scannell to sign checks for Mr. Cowen and do his business; that he knew that there was some document which he thought he had signed, as well as Mr. Henderson.

Mr. Jacobs then showed the Trust Agreement to Mr. Bullock, which was offered and received in evidence and marked Trustee's Exhibit Number Nineteen.

The witness testified that he signed the agreement as Cashier at his desk in the Fort Sutter National Bank; that he had not discussed with Mr. Henderson [111] prior to his signing the agreement the fact as to the advisability of the bank signing such an agreement; that he recalled the contents of the agreement; that it provides for a trusteeship of the Cowen Company, with Mr. Henderson and Mr. Scannell acting as trustees; that this did not recall to him that he gave any instructions relative to the changing of the account; that he did not give any such instructions and was positive of that; that he recalled about the changing of the signatures; that the matter was brought up; and that Mr. Wiener, or his attorney, he did not remember which one said it, brought it up at the time they were in the bank, and they said we would have to change the signature of Cowen; there was a discussion of the post-dated checks at that time, and we thought it advisable to change the signature; it was not quite clear in his mind, but he thought that was what was said.

Testimony of E. W. Kennerly (Recalled).

Mr. KENNERLY was recalled by Mr. JACOBS and testified as follows:

That in the matter of bookkeeping of the George W. Cowen Company, it was customary to keep a carbon copy of all checks drawn, except pay-roll checks; they were made on a separate check.

Mr. JACOBS.—Q. I am going to show you some sheets here that are apparently carbon copies of checks. I took them out of the sheets myself, because I wanted to examine them. You have it from me, but I will call his attention. I will show you what appears to be carbon copies of checks drawn by you, and in particular call your attention to what appears to be a carbon copy of Check No. 1500, drawn in favor of Trustees, Geo. W. Cowen Co., Inc., Sacramento, on the 24th of September, 1920, in the sum of $2,030.90, upon which there is a [112] notation "Balance account Fort Sutter Account, George W. Cowen, Inc., September 23, 1920, E. K."

WITNESS.—That is a carbon copy of a check drawn at that time, and there is a rubber stamp noted on this check "J. M. Henderson, Jr., and T. J. Scannell, Trustees George W. Cowen Co., Inc., that he personally drew the check, but did not remember who instructed him to do so; he could not recall exactly what was done with it, unless it was deposited; the cancelled check should show.

(Testimony of E. W. Kennerly.)

Mr. JACOBS.—Q. I will show you Deposit Tag marked Trustees' Exhibit No. 5, showing a deposit of $2,030.90 to the account of J. M. Henderson and T. J. Scannell, Trustees George W. Cowen Co., Inc., with the Fort Sutter National Bank, on September 24th, 1920, and ask you if you personally did not make the deposit. The witness answered that he did not; that it looked like Mr. Scannell's handwriting, but he couldn't say that it was, but he was positive that it was not his.

Q. You are sure you do not recall who instructed you to draw that check? A. No, sir.

Mr. JACOBS.—Q. I will show you what appear to be carbon copies of a series of checks, drawn in favor of different parties, commencing with No. 1430 and including No. 1457, the first of which checks is in favor of the Advance Waist Company of New York, in the sum of $50, and following, in favor of Bann & Wolfe of New York, $50; Carl Bonwit, of New York, $50; Claire Bell Dressers, New York, $50; Kahn & Rosenberg, New York, $100; Emory Beers & Co., New York, $100; Marshall Field & Co., New York; $50; E. B. Fiske & Co., of Chicago, $100; Ginsberg Brothers, New York, $50; George C. Heineltender & Co., New York, $200; Anderson & Finley, New York, $50; LeHigh Silk Hosiery Mills, New York, $100; [113] Isadore Levy Co., New York, $100; Levy & Merzberg, New York, $50; Edmund Loewy & Co., San Francisco, $50; Markowitz Sons, Inc., New York, $200; Morris S. Meyer, New York, $100; M. & H. Ranter, New

(Testimony of E. W. Kennerly.)

York, $50; Royal Dress Co., New York, $50; Schweitzer-Burke Co., New York, $50; Smith Inc., New York, $100; R. S. Stern, New York, $100; Vogue Negligee, New York, $150; Goldberg & Co., New York, $50; Herman Zeigler & Co., New York, $100; Joseph Zukin, Los Angeles, $100; M. & H. Ranter, New York, $42,—and ask you whether or not you personally drew those checks, to which the witness answered, "Yes, sir."

Mr. JACOBS.—Q. I will call your attention to the writing across the face of the carbon copy of those checks of each and every one of them, a notation "9-23- payment stopped," the initial "K" encircled, and ask you if you wrote that across each of those checks.

The witness answered, "Yes, sir," and that that indicated if he remembered rightly that the checks were postdated; that the words "payment stopped" did not necessarily indicate that the checks were postdated, and that the words indicated that the payments were stopped for some reason or other; that the bank was notified not to honor those checks when presented. He did not remember who gave him the instructions and did not recall any discussion with anyone at any time as to payment being stopped, or as to the making of the notation; he did not recall when he was instructed to make the notation, and it would not necessarily be on the date noted, to wit: September 23d, 1920, nor as much as a week or a month before that; it could have been some time afterward; it was hard to

(Testimony of E. W. Kennerly.)

say. The date indicated that it was the date payment was stopped, or [114] instructions given at that time, but he couldn't say whether the bank was instructed at that date to dishonor those checks, and that he could not recall who told him to put that on there; the only reason that he recalled it was that he recognized his handwriting.

Mr. Jacobs showed the witness Trustees' Exhibit No. 19 and asked whether or not that is the agreement which the witness saw on the evening of September 15th, or rather, one of the duplicates of that agreement, and the witness testified that he saw something that appeared like it, but he never read it; he did not see the signatures; that at the meeting in Mr. Cowen's office about September 15, 1920, in relation to the trusteeship going into effect, Mr. Henderson told Mr. Cowen to go out and get the necessary signatures, or something to that effect, and it was the witness' understanding that the agreement was to go into effect only if the signatures were obtained, and that notwithstanding that understanding he personally decided that the account should be changed to the trustees' account, after these first checks were signed by Mr. Scannell. He did not make the change until after the first checks were signed by Mr. Scannell; to his knowledge; that when he presented the checks to Mr. Cowen, the latter told him to take them to Mr. Scannell, and it was then that he determined that the account should be changed; he had never discussed with anyone the matter of changing the ac-

(Testimony of E. W. Kennerly.)

count from the name, George W. Cowen Co., Inc., and did not particularly remember it in that way; that he then determined and decided that it would be advisable to change the account, but it was about that way; he changed the account after Mr. Scannell signed the checks and used the rubber stamp which he had previously ordered almost immediately.

Q. What did you do to change it?

A. I just used this rubber stamp.

Q. You what?

A. Used the rubber stamp, was all.

He did not remember when he got the stamps, but it was the last week of September; it might have been a few days after the meeting, he couldn't recall exactly; no one instructed him to order the stamps; he did it himself; [115] he did not arrange with the bank or discuss with any official in the bank the matter of the change; he never saw the bank at all; that he did not recall drawing a check for $2,030.90 in favor of Trustees, George W. Cowen Co., Inc., on September 24th, 1920, but he knew it was in his handwriting; it was not his handwriting on the deposit tag.

The witness again in response to examination on the part of Mr. Jacobs, stated that he did not recall having any conversation with Mr. Scannell during the month of September relative to the trustees' account, and that he is of the opinion that without instructions on the part of anyone he personally decided to change the account and or-

(Testimony of E. W. Kennerly.)

dered the rubber stamps for that purpose, unless there was some instruction from Mr. Cowen in connection with the checks, which he could not recall, his recollection being that he assumed the responsibility and made the change, without instructions from anyone; that he never at any time discussed it with any official of the bank or requested them to make the change.

In reply to Mr. DeLigne the witness testified that the record in his office showed the change of the account, but that he did not go to the bank and make the change, and that he did not go to the bank and deposit the check for $2,030.90, nor was the check made out by him.

In reply to the question by Mr. Jacobs, the witness testified that the deposit tag marked Trustees' Exhibit No. 3, dated September 24, 1920, made out in the name of J. M. Henderson, Jr., and T. J. Scannell, Trustees Geo. W. Cowen Company, was in his handwriting, but he could not remember whether he actually sent it to the bank or not, but the figures were his; the deposit tag being marked Trustees' Exhibit No. 4, made out on the 23d of September, 1920, marked "Trustees, George W. Cowen Co. Inc.," was in his handwriting. The letters "T. R." looked like his handwriting, but he couldn't say which deposits were taken over by himself personally and which were not. He could not remember the date on which he made out the first Trustees' deposit tag.

Testimony of H. H. Robinson (Recalled).

H. H. ROBINSON was recalled and asked the following questions by Mr. JACOBS, and made the following answers: [116]

Q. Mr. Robinson, at the time you were instructed by Mr. Henderson to take the Cowen Company account and credit the amount upon the note, did you personally make an investigation to ascertain whether or not there was any balance to the credit of the Cowen Company on the books of the bank.

A. The Cowen Company was transferred to the trustee account and the amount withdrawn, or a debit tag drawn against the old account.

Q. Then upon September 30th, the date upon which you made the first debit charge to the account, did you personally look upon the George W. Cowen Company account to ascertain what, if any, balance there was in the bank.

A. I would every few days look at the balance of the account charged up.

Q. Well, then, at that time you had information and knew that the George W. Cowen Company account had been closed and a new account opened in the name of J. M. Henderson, Jr. and T. J. Scannell, Trustees of the George W. Cowen Company.

A. Yes. There was a trustee account.

Q. And did you at the time when you discussed the matter with Mr. Henderson and Mr. Bullock, state that your reasons for objecting to the trans-

(Testimony of H. H. Robinson.)

fer were by reason of the fact that there was a trustees account.

A. I didn't object to Mr. Henderson, because he was my superior officer and I was a minor officer, and Mr. Bullock being right there at the bank and Mr. Holland, we were more together and I felt more at liberty to talk with them, rather than to examine my superior so far. [117]

Q. Did you discuss with them the matter that there was a trustees account.

A. I did,—perhaps I didn't say it was under the trustees account. I said that, inasmuch as they were involved the way they were at the bank, the right to charge and consider the bankers' lien, knowing the party was insolvent, the right to charge and consider the bankers' lien, knowing that the party was insolvent, or bankrupt.

Q. You do not recall though whether you discussed the matter that the account should be transferred.

A. Well, of course we all knew that it had been transferred.

Upon cross-examination by Mr. DeLIGNE, the witness testified that he did not discuss the matter of the deposit being in the trustees' account, but simply his doubt was on account of the trouble that the G. W. Cowen Company was in, and that knowing that Mr. Henderson was somewhat in charge of the Cowen Company, he naturally wondered whether or not the other creditors would object to applying that balance on any bankers'

(Testimony of H. H. Robinson.)

lien toward a past due obligation. It might have been that before the first application was made the sheet had been corrected and the account had been put in the name of George W. Cowen Company again, and the sheet worded "Henderson" and "Scannell" had been taken out. He couldn't say that when the deposits were applied on the note whether the account stood on the books in the name of George W. Cowen Co., Inc., or in the name of J. M. Henderson, Jr., [118] and T. J. Scannell, trustees for George W. Cowen Co., Inc.

The hearing was then continued until Tuesday, March 8th, 1921.

On Tuesday, March 8th, 1921, the matter was called for further hearing. Neither Mr. DeLigne nor Mr. Henderson were present. Mr. Jacobs stated that Mr. DeLigne had asked for a continuance of the hearing, as neither he nor Mr. Henderson could be present, but that as Mr. Cowen and his wife had come from Los Angeles, he could not consent to the continuance, and Mr. DeLigne said that it would be agreeable to proceed with the hearing in the absence of himself and Mr. Henderson.

Testimony of Geo. W. Cowen.

Mr. COWEN was called to the stand by Mr. JACOBS and duly sworn.

The witness testified that during the year 1920 he was President of the George W. Cowen Company and had charge of its affairs, and that he had been such from the time of the incorporation of the Company until the filing of the petition in

(Testimony of George W. Cowen.)

bankruptcy. He recalled the agreement entered into between George W. Cowen, Inc., parties of the first part, J. M. Henderson, Jr., and Thomas Scannell, of Sacramento, parties of the second part, and the creditors of the George W. Cowen Company, parties of the third part, and also the meeting which it had been testified was held in the offices of the George W. Cowen Company upon the evening of September 15th; that he was present at the meeting, and recalled the agreement was signed at that time. There was no record kept of what transpired at the meeting of September 15th, outside of [119] the official signing of the papers. There were records kept of subsequent meetings.

Mr. Jacobs showed the witness a book and asked the witness if it containtd a record of subsequent meetings of the parties to the agreement of September 15th, 1920; the witness replied that it was; that it was in the handwriting of Fred Cowen, the Treasurer of George W. Cowen, Inc.; it was made at the time purported to be made, to wit, at the meeting itself, and that he saw Fred Cowen make up the record, and the record coming into his possession was in his desk immediately after the meeting adjourned; that the entries in the book were correct.

The witness read to the reporter from the book as follows:

"Minute-book of the trusteeship of the George W. Cowen Company, Incorporated. September

(Testimony of George W. Cowen.)

22, 1920. Meeting called to order at 7:30 P. M. by M. J. M. Henderson, Jr., Trustee, at office of the George W. Cowen Company, Incorporated, 806 and 808 K Street, Sacramento, Calif. Present: Mr. J. M. Henderson, Jr., Chairman; Mr. T. J. Scannell; George W. Cowen; A. Grace Cowen; W. J. Kennerly, Secretary. All of the following suggestions were acted upon as follows: Proposed by Mr. Scannell, and seconded by Mr. Henderson, Jr., all orders for which shipments have not been started,—Mr. Scannell is to wire cancellation of same at once. Following resolution proposed by Mr. Scannell and seconded by Mr. Henderson, Jr., as follows: Mr. Scannell be authorized and ask Baer and Lienthal of New York to represent George W. Cowen Company, Incorporated, by trustees. Following resolution proposed by George W. Cowen, and seconded by Mr. Henderson, Jr., as follows: Mr. Scannell is authorized to make up ways and means to [120] inaugurate feature sales by special purchases for various departments. The following resolution proposed by Mr. J. M. Henderson, Jr., seconded by Mr. Scannell,—Mr. Kennerly to give Mr. Henderson, Jr., daily reports and conditions of the various departments at his request. Following resolution proposed by Mr. J. M. Henderson, Jr., and seconded by Mr. Scannell, as follows—to meet again Thursday, September 23, at 7:30 P. M. at the office of George W. Cowen Co., Incorporated, 806 K Street, Sacramento, Calif. No further business. Proposed meeting

(Testimony of George W. Cowen.)

adjourned by order of Mr. J. M. Henderson, Jr., Trustee, 9:05 P. M. September twenty-fourth, 1920. At 7:55 P. M. meeting called. Thomas J. Scannell and J. M. Henderson, Jr., Trustees,—all orders and checks to be signed by Trustees to be directed. The insurance to be changed in the name of Trustees."

WITNESS.—"That is all there is in the book The various motions and various resolutions as stated in those minutes were actually made by the parties named therein. Mr. Henderson acted as chairman, the meeting was called as stated, and it was called to carry out the terms and conditions of the agreement of Trusteeship, dated September 15th, and marked Trustees' Exhibit No. 19. Mr. Scannell wrote to Baer and Lilienthal of New York to represent the George W. Cowen Company, Incorporated." The witness had seen the letter at the time it was written, and it was signed by Mr. Scannell; the meeting fixed for September 23d was not held, but a meeting was held on the 24th; he did not remember the reason, but thought it was because Mr. Henderson could not get there. The record in the minutes "Thomas J. Scannell and J. M. Henderson, Jr., Trustees, all orders and checks to be signed by Trustees" referred [121] to the signing of corporation checks for the payment of bills or expenses, or other things; there was very little said in regard to the signing of checks, but there was a sort of belief in the witness' mind that on and after September 15th all matters such as

(Testimony of George W. Cowen.)

signing checks or handling of finances were practically stopped as far as he was concerned; that he believed that at the last meeting Mr. Jacobs had shown him a check which was signed on September 18th, which was prior to that order of September 24th; so it seemed to him they were signing checks much before the 24th of September; that there was very little mention in that respect; the only thing that was said that he was sure of was that Mr. Henderson stated that Mr. Scannell would sign the checks after that time. In respect to the memorandum "Thomas J. Scannell and J. M. Henderson, Jr., Trustees,—all orders and checks to be signed by trustees," the witness testified he did not recall anything further than the memorandum as it appears; he recalled quite a bit of information as to the cancellation of his signature at the bank; he received that information from several of the bank tellers at the Fort Sutter National Bank; if he recalled rightly he was down there on a certain check,—a personal check of his,—he had two bank accounts in the Fort Sutter National Bank, one George W. Cowen and the other George W. Cowen Co., Inc. It was about a week and a half after September 15th he went to see about the withdrawing of the George W. Cowen personal account. About a day later they had transferred an amount of $350, which was on his personal account and applied it as a bankers' lien to the George W. Cowen Co., Inc., account. When he found that out he went to Mr. Bullock,

(Testimony of George W. Cowen.)

the cashier, and it was afterwards released, and he was allowed to draw [122] the amount out of his personal account; that the first information he received that his signature as President of the George W. Cowen Company would no longer be recognized upon the checks of the George W. Cowen Company was about a week and a half after September 24th, when he was informed of this fact by the paying teller at the bank. He discussed the matter of the change of the bank account and the cancellation of his personal signature with Mr. Henderson or Mr. Scannell. It was about a week and a half after September 15th; that he did not discuss it with either of those gentlemen prior to the time that it was actually cancelled at the bank on September 24th; the change was made at the bank and his signature cancelled without doubt on the authority of Mr. Henderson; he did not know personally that it was Mr. Henderson. Mr. Scannell referred everything to Mr. Henderson, stating that he was the boss and his orders came from him. He discussed the matter of the change of the signatures at the bank with Mr. Kennerly several times; that he had various talks with Mr. Kennerly, practically every morning from September 15th on. One of the main talks was regarding the amount of money which was being withdrawn from the bank account and applied to the loan, which they had at the Fort Sutter National Bank. He did not have any discussion with Mr. Kennerly regarding the signatures of the

(Testimony of George W. Cowen.)

checks, and so forth; he took that up with Mr. Scannell; he had never instructed Mr. Kennerly or Mr. Scannell to change the signature on, or recognize signatures of the checks of the George W. Cowen Company; that up to September 15th, 1920, Mr. Kennerly and Mr. Scannell were employees of the George W. Cowen Company, working directly under him and took their orders directly from him, and were responsible to him personally. After September 15th they took their instructions from [123] Mr. Henderson, he was absolutely positive, and after that date he did not give either of those gentlemen any instructions, nor attempt so to do.

Mr. Cowen was withdrawn from the stand, and Mr. KENNERLY was recalled by Mr. JACOBS.

Testimony of E. W. Kennerly (Recalled).

The witness testified that his memory had not been refreshened since the last meeting and that he did not recall at this time any other fact or anything that happened at either of those meetings other than he had previously testified to.

The witness was shown what appear to be minutes of meetings held in the office of George W. Cowen Company on September 22, 1920 and September 24, 1920, and said that he thought he could recognize the handwriting of Fred Cowen, and that it looked like his signature; that he recalled something in connection with the making of the record, but couldn't say that he had seen this book; he

(Testimony of E. W. Kennerly.)

recalled some of the things that were mentioned in the record. He remembered being present at the first meeting, and also about the feature sales and reports.

Mr. JACOBS.—Q. What is that about reports? You recall that Mr. Kennerly was to give to Mr. Henderson, Jr., daily reports on the conditions of the various departments, at his request, and that that discussion came up at the meeting held under date of September 22d, 1920?

A. Well, whatever date it was,—I suppose it was that date.

(The witness continued:) That he would not remember the fact that Mr. Scannell was authorized to write and ask Baer & Lilienthal of New York to represent George W. Cowen Company; that wouldn't be within or pertain to his duties and would not make a very deep impression upon him, and that he not take part in the discussion at all; [124] of course he was there and remembered it. He was unable to say that he recalled the matter of the cancellation of the shipments which had been started. He remembered Fred Cowen asking him how the record should be written up; he thought it was the same night after the meeting. He recalled no facts in addition, connected with the case, as he did not take part in the discussion at all, and it was less interesting than had he taken such part. He recalled that Mr. Henderson acted as chairman.

Testimony of R. H. Maywood.

R. H. MAYWOOD was called by Mr. JACOBS, duly sworn as a witness, and testified as follows:

That he is Assistant Cashier of the Sacramento-San Joaquin Bank, Seventh & J Street Branch; it was in October he thought that the Sacramento-San Joaquin Bank took over the assets of the Fort Sutter National Bank, and that he was connected with the Fort Sutter National Bank prior to that time in the same capacity that he is now employed there.

The witness identified a check dated Sacramento, California, 10-22-1920, drawn on the Fort Sutter National Bank by George W. Cowen Co., Inc., and signed "George W. Cowen, President," in favor of A. Grace Cowen, Sacramento, California, in the sum of $250, endorsed in the back "A. Grace Cowen." He couldn't say whether the signature of "George W. Cowen, President" of the George W. Cowen Co., Inc. was in force and effect, or had been cancelled at that time.

The witness was shown Trustees' Exhibit Nos. 16 and 17, and testified that they were on the bank's forms and the words, "Cancelled Sept. 24, 1920, G. S. B." looked like the writing of George S. Bullock. [125]

He could not remember whether he personally instructed the Paying Teller to pay that check dated October 22, 1920, drawn by the George W. Cowen Co., Inc., and signed by George W. Cowen

(Testimony of R. H. Maywood.)

to A. Grace Cowen, but if he remembered correctly, he happened to run into Mrs. Cowen in the corridor, and if remembered correctly, Mr. Henderson telephoned up to him and said, "Mrs. Cowen is coming up there with a check for salary purposes," and to instruct them to take this check; he did not say by whom the check was signed, as far as he remembered; it was a long time ago and those things came up every few days, and he would not remember it anyway. He did not think he would have honored a check drawn by the Cowen Company and signed by George W. Cowen at that time, unless he had received instructions or knew something beforehand as to the check. At that time he knew the Cowen Company was financially embarrassed; he had discussed that with other officials of the bank, and the way he remembered it, it must have been some instructions from Mr. Henderson; he thought he telephoned to him. Mr. Henderson being President of the bank and his position being under him, he would recognize his right to instruct him as to matters of that kind.

Testimony of Mrs. A. Grace Cowen.

Mrs. A. GRACE COWEN was called by Mr. JACOBS, sworn as a witness and testified as follows:

That she is the wife of George W. Cowen, President of the George W. Cowen Company; that she was employed by the Company as a saleslady from the time they first started and was also vice-presi-

(Testimony of Mrs. A. Grace Cowen.)

dent of the Company and held one share of the stock therein; that she had personal charge of the Cloak, Suit and Millinery [126] Departments; that her connection with the George W. Cowen Company ceased on the 30th of October, 1920; that the check dated October 22, 1920, drawn on the Fort Sutter National Bank by George W. Cowen Co., Inc., signed by George W. Cowen, in favor of A. Grace Cowen, for $250, being check No. 1524, endorsed on the back, "A. Grace Cowen," was received by her some time before she severed her connection with the Company. The check was endorsed by her and she received the money represented by the check.

The circumstances in connection with that check were that she went to Mr. Scannell; it was understood when Mr. Henderson and Mr. Scannell became trustees, that they would retain her services and pay her a salary that in her mind would be reasonable. She said at that time she had been receiving $400 and expected the same salary. After she had been in service there about a month, she went to Mr. Scannell and asked him if he would pay her salary, and he said that he couldn't pay it; he had nothing to do with it, and for her to see Mr. Henderson. She phoned to Mr. Henderson and he said he knew nothing about it. She then went back to Mr. Scannell and he said that he had talked to Mr. Henderson several times and could not get any headway with him at all; so she then went to see Mr. Henderson herself and

(Testimony of Mrs. A. Grace Cowen.)

he said, "Mrs. Cowen, you have Mr. Cowen draw a check for two hundred,—not over that amount," and she said that was not the salary she was supposed to get, and that she was supposed to draw $400 a month, and he said: "Well, that is all we think we can pay you now," and she said: "Well, you know, Mr. Henderson, that Mr. Cowen isn't signing checks, and will that check be honored?" and he said he would see that it was honored. [127] She came back and reported to Mr. Scannell and asked him if he didn't think that was quite unusual, and he said yes, but evidently Mr. Henderson had some purpose in doing so. Mr. Kennerly made out the check and Mr. Cowen signed it; she took the check to the bank, presented it and the Teller was about to turn it back, when Mr. Maywood spoke up and said, "You can honor the check." That occurred on October 22d, 1920, the date of the check; that she thought it was at the first meeting when they were all there that Mr. Henderson said they would retain her services at a reasonable salary which she should fix; that it was put in the Minute Book of the first meeting, at which Mr. Henderson, Mr. Scannell, Mr. Kennerly, Mr. George W. Cowen, Mr. Fred Cowen and herself were present; that Fred Cowen kept the records, which she saw him make up; that she had again seen the record yesterday.

The witness identified the book shown to her by Mr. Jacobs, being the same book previously shown to Mr. Kennerly and Mr. George W. Cowen, and

(Testimony of Mrs. A. Grace Cowen.)

marked Trustees' Exhibit No. 22. Mr. Henderson presided at the meeting; there were several discussions she said about feature sales and changing the different system throughout the store, whereby they could make more sales and buy more merchandise; she did not recall any discussion at that time relative to the cancellation of signatures upon checks, or the opening of a new bank account; nothing like that transpired at all; that she knew that Trustees' Exhibit No. 19, being Trust Agreement, was executed on September 15th; that she obtained her information from Mr. Cowen and Mr. Scannell; Mr. Scannell came to her and said that he was going to take charge of the store, and I was to act under his supervision and take orders [128] from him, that was about September 22, 1920; on the night of the meeting she told Mr. Henderson that she was not just satisfied with Mr. Scannell managing the business; that she did not think he was a competent person, and Mr. Henderson said: "Well, it isn't my fault that he is in here,' and that she made several little complaints and that Mr. Henderson kind of ignored them; that she afterward talked to Mr. Henderson about the management of the business; that there were little things in the management on which she didn't agree, and she went to Mr. Henderson about it; Mr. Henderson didn't pay any attention, because the ideas of Mr. Scannell and herself were continually conflicting. Mr. Henderson told her several times that Mr. Scannell was in full charge of

(Testimony of Mrs. A. Grace Cowen.)

the business, but she did not remember him ever saying that she must work under his direction, although Mr. Scannell did inform her as to that; that Mr. Henderson actually said to her on several occasions after September 15th, that Mr. Scannell was in full charge of the business; that on the question of her severing her connection with the Cowen Company, she went to Mr. Henderson and told him that the business could not keep on in the manner in which it was being conducted, and Mr. Henderson told her that things were getting unpleasant, and he would advise her to withdraw, and she left that morning and had not been in the store since; that she remembered being present at the meeting on September 15th, and that Mr. Wiener, Mr. Rubinger, Mr. Michel, Mr. Russell and Sam Jones were present. She did not remember whether a record of the meeting was kept or not.

Mr. JACOBS.—Q. I show you a book which purports to be the minute-book of the George W. Cowen Company, and I call your particular attention to what appears [129] to be the records of the minutes of a special meeting of the directors of the George W. Cowen Company, Inc., held September 15, 1919, which minutes are very short, and I will read them,—the record to you, and ask you if you were present at that time and participated at that meeting: "Minutes of Special Meeting, directors of the George W. Cowen, Incorporated, held September 15, 1919,"—it ought to be 1920,—

"pursuant to a written call and waiver of notice, the Board of Directors of George W. Cowen, Incorporated, held a special meeting at the office of the Company in the City of Sacramento, State of California, at the hour of one o'clock, P. M. on the fifteenth day of September, 1920." It is to be noted that the latter date states 1920, whereas the former notice states September 15, 1919, and as they follow the minutes of May 22, 1920, I presume the year 1920 should be, rather than the year 1919. "All of the members were present, as follows: George W. Cowen, A. Grace Cowen, Fred Cowen, Bert Wiener, and F. E. Michel, Jr. On request of the President, the Secretary presented the call and waiver of notice pursuant to which the meeting was held, duly signed by all the members of the Board. It was ordered that the same be spread upon the minutes as follows: 'That the undersigned, being all of the Board of Directors of George W. Cowen, Inc. do hereby call a special meeting of the Board of Directors of said Company to be held in the office of the company in the City of Sacramento, State of California, at the hour of one o'clock P. M. on the fifteenth day of September, 1920, for the purpose of considering and acting upon a proposition to assign to Trustees all of the property and business of the Corporation, to Trustees for the benefit of the creditors of the Corporation, and for the doing of [130] all such other things as may be necessary or desirable in connection therewith; and

(Testimony of Mrs. A. Grace Cowen.)

we hereby waive all statutory and by-law requirements as to notice of time, place, and objects of this meeting, and consent to the transaction thereat, any and all business pertaining to the affairs of the Company. Dated, Sacramento, California, September 15, 1920,' "—five lines to sign but no signatures. Were you present at such meeting at that time, Mrs. Cowen? The witness answered: "I don't remember whether I was or not, Mr. Jacobs."

The witness further testified that the check for $250 which she had testified to was the only check she had received since the 15th of September, 1920, from either George W. Cowen Company or J. M. Henderson, Jr., and T. J. Scannell, trustees. After September 15th, 1920, Mr. Cowen told her that he was no longer in charge of the business, but he did endeavor, all over the store, to help sales as much as he could. She remembered upon that question after September 15th, Mr. Cowen attempted to instruct the Window Dresser and the Advertising Girl, but she would not take any orders from Mr. Cowen; she took them from Mr. Scannell; after September 22d, both of our instructions were ignored.

Mr. JACOBS.—Q. I will read a paragraph of the answer which has been filed by Mr. J. M. Henderson, Jr., and Thomas Scannell, to the proceedings instituted on behalf of the trustee, which paragraph is set up in page three of the answer, and commences at line 8 as follows:

(Testimony of Mrs. A. Grace Cowen.)

"That at all times from the time said agreement was signed, and until the institution of these proceedings in bankruptcy, the respondent Henderson refused to act or assume any responsibility or trust under said [131] agreement, until the same should be signed by the creditors of said George W. Cowen, Inc., and particularly by the New York creditors, and expressly so stated on divers occasions, during said period of time, to the respondent Scannell, and to officers of the George W. Cowen Co., Inc.

Now, I will ask you whether Mr. Henderson at any time *to* stated to you. The witness answered: "Yes." This was the first,—in the first meeting, on the 22d of September, we were all in the office, and Mr. Henderson turned around and said to Mr. Scannell: "Mr. Scannell and I will be willing to act as trustees, providing we can get the creditors to sign up," and that was the first meeting that I heard Mr. Henderson say distinctly, but after that, there was nothing mentioned about it at all, whether they had signed or whether they had not signed.

The witness testified that it was not true as alleged in the answer of Henderson and Scannell that George W. Cowen reinstated his brother-in-law after his discharge by Mr. Scannell, and further testified that Mr. Scannell positively refused to follow any instructions from either Mr. Cowen or her or to consult with them after September 15th.

Testimony of George W. Cowen (Recalled).

GEORGE W. COWEN was recalled by Mr. JACOBS, and testified as follows:

Mr. Jacobs showed the witness a book which purported to be the minute-book of the George W. Cowen Company, and which apparently had the record of a special meeting of the Board of Directors held on September 15, 1920 at the hour of one o'clock P. M. at which it states there were present: George W. Cowen, President, and all the members [132] of the Board; George W. Cowen, A. Grace Cowen, Fred Cowen, Bert Wiener, and F. E. Michel, Jr., but the minutes of which meeting appeared not to have been signed.

The witness testified that the meeting was held as therein recorded, and that all parties named were present except A. Grace Cowen, and he did not remember of her being there, but was not positive.

The witness testified that the resolution authorizing the assignment to J. M. Henderson, Jr., and Thomas Scannell, as Trustees, as shown in the purported minutes was adopted, and that the Trust Agreement, being Trustees' Exhibit No. 19, was executed in pursuance of the resolution; that no further meetings of the Board of Directors or stockholders of the George W. Cowen Company has been held since the date mentioned; that there had been no meetings of the Board of Directors or stockholders between May 22d, 1920, and September 15th, 1920.

(Testimony of George W. Cowen.)

The book was offered and received in evidence as Trustees' Exhibit No. 23.

The witness testified that the facts in relation to the trust agreement *is* as follows:

The purposes of the trusteeship was taken up with Mr. Henderson of the Sacramento Bank, possibly a week or two weeks before September 15th, with the understanding to be refinanced; the main purpose of signing this agreement was to obtain approxin ely $25,000 in cash from Mr. Henderson, and of course with the proviso that the creditors would set aside their claims for a period of one or two or three years, so that the business could have new capital, and would be refinanced, new purchases being made, and so forth. That was discussed at length about two weeks before September 15th, [133] with the understanding that we would be refinanced, and that Mr. Scannell and Mr. Henderson would be the trustees. At the time of the meeting of September 15th, there was only about possibly half an hour wasted in signing the agreement, as it was all understood to be signed. The meeting following that time was held on September 22d, where we had a discussion with regard to the management of the business, after the trustees' agreement was in effect and after Mr. Wiener returned to New York City. The discussion at that time was mainly on plans to conduct the business, who would have charge of the business, and Mr. Henderson read over the trustees' agreement and asked Mr. Scan-

(Testimony of George W. Cowen.)

nell if he would accept the same and did accept the same at that meeting. There was quite a discussion with Mrs. Cowen regarding an employee who refused to be discharged, and then there was quite a discussion with Mr. Fred Cowen and Mr. Henderson regarding certain points of management, as Mr. Fred Cowen desired that certain departments be changed, certain help be discharged, new help to be put in, and so forth. Mr. Henderson, about half an hour after the meeting opened, suggested to Mr. Fred Cowen that he keep a book of minutes, asked Mr. Kennerly to provide a book, so that he could write down the exact minutes of the meeting; he did that and Mr. Cowen was appointed secretary of that meeting. He wrote down practically everything which had transpired, of which we have the record. The discussion also was made in regard to the loan of $25,000, which I brought up, as I realized that we could not continue the business without finances. Mr. Henderson desired Mr. Scannell to cancel all the other orders, the old orders, to arrange for a new buying concern of [134] New York City to do our purchases, asked for a list of what amount of purchases we ought to have in order to put the store in a good salable condition, and asked my opinion on it, also, and we agreed to spend about $15,000 out of the proposed loan of Mr. Henderson's money toward the purchase of new merchandise. As the argument came up between Mr. Scannell and Mrs. Cowen relative to

(Testimony of George W. Cowen.)

the mismanagement of the concern, and a sort of a dissent amongst the management, we then decided to postpone all such plans of repurchasing new merchandise, and also plans of reorganization or anything of that kind, until a further meeting which was held two days later, I believe. The meeting seemed to lack individuality of this sort, of—I would call it a fight,—small fight, which had evidently started in Mr. Henderson's mind, in the organization of the business; from that time on he told me to center my mind on getting these creditors to sign this agreement, and not bother myself about the management, in any way, and they would see how the creditors signed the agreement, and how it progressed, before they would consider to put this new merchandise and start to put the new money into the business, as he stated, positively, he could not put any money into it at all until all of the creditors signed our agreement. Now that was about the extent of this agreement. There might have been other details, but I think that covered all of the meetings prior and subsequent.

The witness continuing, stated that prior to September 15th, Mr. Scannell was superintendent and floor-walker; that he signed a subscription for $3,000 worth of stock, and placed in the treasury of the company [135] $300 or $200 in actual money; that he never received any stock, but received a receipt for $200 and owes a balance of $2800 for the stock; that he was working under the personal direction and instructions of the wit-

(Testimony of George W. Cowen.)

ness, and had no authority other than that conferred on him by the witness. Prior to September 15th, they discussed who was to be manager of the business and he said that Scannell would be the best fitted to handle the witness' end of it when he stepped down; that he did presumably step out and placed Scannell in charge after September 15th; it was understood according to the trustees' agreement that Scannell was to be manager of the business; that he did not instruct him that he was manager of the business, and that he gave him no instructions to cancel his signature at the bank, nor did he ever instruct the bank to cancel his signature, and that he did not know who gave such instructions; that on October 22d, when he gave a check in favor of Mrs. Cowen for $250, he did not know that the signature had been cancelled, and that he did not attempt to sign any other checks between September 15th and the 22d of October, and only relied upon the agreement being in force and effect and stepped out of the management in favor of Mr. Scannell as agreed at that time.

Mr. JACOBS.—Q. Did Mr. Henderson at any time give you any instructions after the date of this agreement?

(The witness answered:) He gave me instructions to sign the creditors up, the local creditors, to that agreement, which I did, what is on there.

The witness continuing, testified that Mr. Henderson never gave him any instructions about the

(Testimony of George W. Cowen.)

[136] employment or discharge of help, but he discussed with Mr. Henderson the employment and discharge of help quite a bit; that was about a week and a half after September 15th; that subsequent to September 15th they discharged his brother; that the witness was very mad about that and went down to see him, and told him he was making a very foolish mistake as they could have discharged five or ten other people in the store, but not discharge anybody of valuableness, as far as the management of that department. He stated that Mr. Scannell was in charge of the place, and anything he said would go, and that was the end of that. He was discharged and was never reinstated; that he did not believe it was true that the allegation contained in the answer of Henderson and Scannell to the effect "that at all times from the time said agreement was signed until the institution of these proceedings in bankruptcy the respondent Henderson refused to act as or assume any responsibility or trust under said agreement until the same should be signed by the creditors of said George W. Cowen Co., Inc., and particularly by the New York creditors, and expressly so stated on divers occasions during said period of time, to the respondent Scannell and to officers of the said George W. Cowen Co., Inc."; that he did not believe it was true that Mr. Henderson never did state to the witness that he would not act as trustee, and as a matter of fact, from and after September fifteenth, 1920, he did actually assume

(Testimony of George W. Cowen.)

charge of the business. It is also a fact that from and after September fifteenth, 1920, Mr. Scannell was taking direct instructions from Mr. Henderson and Mr. Henderson only. It is also true that Mr. Scannell at all times had no personal interest in the business other than the three hundred dollars which he had paid on account of stock subscription; that it was not true that he, the witness, reinstated his brother or brother-in-law, or that he ever reinstated anyone, and it was not true that Henderson at all times maintained that neither he, said Henderson, or said Scannell would have any right or authority under or by virtue of said agreement until same should be signed by all the creditors of said corporation [137] and at no time exercise any such right or authority, but that Henderson and Scannell had everything to do with the business and were in the direct charge of the business from September 15th; that Scannell recognized no one but Henderson, and that the witness did not attempt to give any instructions after September 15th.

I discussed on several occasions with Mr. Scannel the management of the business, but he did not follow my suggestions or take any instructions from me, and as a matter of fact, he refused positively to take instructions from me, which refusal was made after September 15th.

Mr. Scannell was recalled by Mr. Jacobs, and testified that the record book, marked Trustees' Exhibit No. 21 was correct in the record relating

(Testimony of George W. Cowen.)

to the cancellation of orders for shipments which had not been started, and of the proposition of having Baer & Lilienthal represent the firm, and the record in reference to making up feature sales, and the article in reference to Mr. Kennerly giving reports to Mr. Henderson is correct—at his request, but the last one, 9–24–20, that orders and checks should be signed by the trustees, that he did not think was right, but he was not sure about it, and did not remember that at all. As to having insurance transferred to the trustees, he did not know that that was proposed, at that time or later, because he remembered a man who was up there from Mr. Kirk, wanting to have those things transferred, and he knew there had not anything been done about it at that time. I am pretty sure that Mr. Cowen requested me to sign checks about September 24th, and I am pretty sure that Mr. Henderson never requested me to sign checks.

The witness identified the deposit tag for $2,030.90, dated September 24, 1920, being Trustees' Exhibit No. 5, and testified that the deposit slip was in his handwriting; that he had been trying to figure out how he happened to do it; that he did not remember whether he went over to the bank at that time and spoke to someone over there in reference to it; one of the cashiers, and they suggested his doing it or not. He could not remember how he happened to make out the deposit tag. [138]

The witness identified a check dated September 24, 1920 for $2,030.90, drawn from the George W.

(Testimony of George W. Cowen.)

Cowen Co., Inc. account, which check was marked Trustees' Exhibit No. 20, as being signed by him.

Mr. JACOBS.—Q. Now, the testimony or the facts of the case, Mr. Scannell, show that the old account was closed at the time this check was drawn and together with other funds it was deposited in the bank under the date of September 24th, from which time on the checks were signed by you as Trustee; now, haven't you any recollection of under whose instructions this was done or the reason for it?

(The witness answered:) This was done as I told you. The gentleman who came up from Mr. Kirk's office was particularly anxious to have this account transferred over to a trustee account, and I am just trying to figure out whether I was told to do this by Mr. Bullock, or by whom. I think I went over to the bank at the time and I talked to somebody there, either Mr. Bullock, or somebody like that; I think that was the way the instructions were given to me. I was told to transfer this money and to make this deposit that way, and then I recollect shortly after that in discussing the thing with Mr. Henderson, Mr. Henderson told me that there was not any such thing as a trusteeship. What they were going to do with it afterwards, I have forgotten. It was fully a month after the account was changed that Mr. Henderson stated that there was no such thing as a trusteeship. This came up when Mr. Cowen recommended that the help be cut down to the very lowest possible

(Testimony of George W. Cowen.)

point, and that is the time I went down and talked to Mr. Henderson and went to him more in [139] an advisory way than anything else and he said: "Mr. Cowen is the boss, and if he demands it you have got to do it," and I did it. The witness continuing testified as follows:

Then too, when this thing was still in abeyance and before the action taken in New York on the 28th, there were several telegrams that came back and forth between Nathan and Wiener, who were supposed to sign up the New York creditors, and Mr. Henderson sent several telegrams to them, in which he stated that until all the creditors were signed up, he refused to assume full authority as a trustee. Mr. Henderson dictated the wires and the witness sent them. Between the date of the meeting of September 22d and the time of this transaction he had with Mr. Henderson, the witness testified he went ahead as he had always done and was the manager in charge of the business; that he took instructions from Mr. Cowen; that Mr. Cowen decided to cut out the advertising completely; that the only time the matter of employment or discharge of help came up was at the time Fred Cowen was discharged; that he went down to Mr. Henderson and Mr. Henderson said Mr. Cowen demanded that he get rid of all the help, and he did, and he happened to include Fred Cowen and his brother-in-law, and Cowen put them both back to work the next morning; that he was frank to say that he had nothing to do with the financial

(Testimony of George W. Cowen.)

part of it, but so far as help was concerned, he knew what he was talking about; that if Mr. Jacobs had not shown him the check and deposit tag he would positively have sworn on his life that he had had nothing to do with the financing. The only thing he remembered was that the man who came up from Mr. Kirk's office asked that the account be transferred over to the trustees; that he is not sure that he talked with Mr. Bullock, but he thought he did, he imagined he did; that the reason why he said that he might have talked with him was that he knew he was head of the bank; that [140] he did not remember having any discussion with Mr. Kennerly about the account, or changing it, or how it should be handled; that he had seen two rubber stamps with the words, "J. M. Henderson, Jr., and T. J. Scannell, Trustees of the George W. Cowen Company," but when he first saw them he could not say; that he did not order them and had nothing to do with them.

In reply to Mr. DeLigne, Mr. Scannell testified that he did not handle any of the money during the time from September 24th up to the time the receiver was appointed; that he did not have any control of the money taken in from sales or otherwise coming into the store; that he had never exercised any such authority or made any direction, except that he signed the deposit tag, the circumstances of which he did not remember, except that he recalled with reference to that, the gentleman who represented Mr. Kirk's office saying that

(Testimony of George W. Cowen.)

the money should be transferred over to a trustees' account, and whether he talked with Mr. Bullock at that time, or whom he might have consulted, he would not be sure; that the subsequent deposits made in the bank were not made by him or under his directions.

In reply to questions of Mr. Jacobs, the witness testified that it must have been around September 24th that the representative of Mr. Kirk called upon him, and that he might have had some discussion with Mr. Henderson, in which he might have said that a representative of Mr. Kirk's from the Board of Trade had seen him, and that he might have mentioned to him that the representative of the Board of Trade or Mr. Kirk had suggested that the account be put in a trustee's name; that he could not [141] figure out how his name was on that deposit tag; that he hadn't the slightest recollection of the transaction whatsoever; that he never paid any attention to the financial matters of the business; that the agreement and understanding of the various parties as the result of the meeting of September 23d was that he should just simply keep on in the position that he had practically held; to keep the business going, and he did not recollect of the suggestion being made that they stop all shipments; everybody agreed that he should do that at that meeting; that he had said that he presumed if the trusteeship went through, naturally Mr. Henderson would be the financial man. No specific mention was made as to financial matters at all; of that he was sure.

Testimony of Fred Cowen.

FRED COWEN was called by Mr. JACOBS, duly sworn as a witness and testified as follows:

That he was an officer and stockholder of the George W. Cowen Company during the year 1920 up to about the 12th of October, when the petition in bankruptcy was filed; that according to the by-laws he was supposed to be the treasurer; that he took charge of the office management; that on October 9th he was told by Mr. Scannell to put in his resignation; that he had gone to Mr. Scannell to complain about the discharge of a valuable employee named Freer, and to ask the reason why, when Mr. Scannell told him that he had better put in his own resignation, and said that the witness had gone down to Henderson's office yesterday morning to complain about the running of the establishment. The following day he went into the store and Mr. Kennerly told him there was due about $116, [142] or something to that effect, up to October 9th, and he told Mr. Kennerly that he did not want that; that he was employed by the month. He reported next morning and Mr. Kennerly brought him down an order from some outside customer, enclosing two bills, and he said to Kennerly that he wasn't working there any more, and Kennerly said that he was the only one to attend to it, so he said alright, that he would attend to it. On the third or fourth day after that he went to the office and saw Mr. Scannell and told him

(Testimony of Fred Cowen.)

that he was reporting there for work, and that Scannell told him he could do as he darned pleased; that he left the employ of the Cowen Company on the 12th of November, and that he stayed in the business from the 9th of October until the 12th of November; that he had kept a record of proceedings at the meeting introduced in evidence and marked Trustees' Exhibit No. 22; that he made the record on the evening of September 22d, 1920, at 808 K. Street, Sacramento, at the request of Mr. Henderson, at that particular meeting; that the record correctly stated what actually transpired at the meeting, as dictated or rather suggested by Mr. Henderson; that Mr. Henderson was there at the time he wrote the minutes and acted as chairman of the meeting; that Henderson assisted him in phrasing sentences, so they would be in the form they are at present; that the record in the same book of a meeting on September 24, 1920, which was in lead pencil, was his handwriting; that the record was made at the time, September 24, 1920, and correctly stated what transpired at that meeting. The record was written at the suggestion or instructions of Mr. Henderson, and he was present when the notations were made; he saw the witness write the record, but he did not know whether Henderson read the record at [143] that time, that he read the record to Henderson of both meetings, September 24th and September 22d; that he told George W. Cowen the circum-

(Testimony of Fred Cowen.)

stances of his discharge, and the latter told him that he had a contract, and what it called for he would draw, but George Cowen did not tell him that he was in charge or had any authority, for it was taken away at that particular meeting of September 22d; that George W. Cowen did not at any time after September 22d attempt to in any way exercise any authority in the conduct of the business, nor to give him or any of the other employees, to his knowledge, any instructions; that George W. Cowen did not revoke the order of Mr. Scannell and the George W. Cowen Company did not reinstate him.

Mr. DeLIGNE.—Q. Mr. Cowen, I see in this minute-book noted in lead pencil "9-24-20. Meeting called. Thomas J. Scannell and J. M. Henderson, Trustees—all orders and checks to be signed by trustees." Who were present at that meeting?

A. Mr. Henderson, Mr. Scannell, Mr. Kennerly, George W. Cowen, A. Grace Cowen and Fred Cowen.

Q. Why didn't you put in the names of those present at the meeting?

A. For the simple reason we were working all night up until half-past ten and Mr. Henderson wanted to go home. He was tired, and after he had proposed these different propositions he said, "You fill it out some other time, Fred, and let's go home."

Q. Here is written in lead pencil, "Thomas J. Scannell and J. M. Henderson, Trustees—all orders

(Testimony of Fred Cowen.)

and checks to be signed by trustees." What was that, a resolution? A. Yes.

Q. Why didn't you put in who made the resolution and who seconded it?

A. For the simple reason that we left there about half-past nine or ten o'clock that night, and he said, "Let's go home and you can finish it the following day."

Q. Do you remember who made the motion and who seconded it?

A. Mr. Henderson, and I think Mr. Scannell seconded it.

Q. At all these meetings at which these resolutions were adopted, at which J. M. Henderson, Jr., T. J. Scannell, George W. Cowen, A. Grace Cowen, W. J. Kennerley and Fred Cowen were present, and yourself, you all voted? [144]

A. Mr. Kennerley did not, because he was not an officer.

Q. On the adoption of this resolution on the 24th of September, did Mr. Scannell, Mr. Henderson, yourself, Mr. George Cowen, Mr. Fred Cowen, Mrs. Grace Cowen, vote on that resolution?

A. Yes, sir.

Mr. DeLIGNE.—That is all.

Mr. JACOBS.—I think that is all.

The WITNESS.—While Mr. Henderson was giving these instructions, such as "Mr. Scannell, why, you shall make the report and take the receipts to the bank every morning," and "You, Mr. George Cowen, why, you sign no more checks,"

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(Testimony of Fred Cowen.)

and "Furthermore, George Cowen, it is no part of your duty to go ahead and sign up some creditors." Previous they were taking joint action as full fledged trustees without their proper power.

Mr. DeLIGNE.—You said that did occur, that he said to Mr. Scannell, "Go down to the bank and deposit that money" and he told Mr. Cowen not to sign any more checks; in whose presence did that occur?

A. Mr. Kennerly, Mr. Henderson, Mr. Scannell, George Cowen, A. Grace Cowen and Fred Cowen.

Mr. SCANNELL.—Q. Mr. Henderson was asked to attend that meeting by Mr. George Cowen in an advisory capacity as to what we should do in reference to keeping the business going, and isn't that how Mr Henderson happened to be present?

(The witness answered:) No, Mr. Scannell. You have that all wrong. At the meeting between Mr. Bert Wiener, Mr. Rubinger, Sam Jones and George Cowen and Fred Cowen being present, upon the agreement of signing that deed of trust, Mr. Rubinger and Mr. Sam Jones stated that Mr. Henderson would act as trustee for the concern and do all in his power and use his influence to straighten out the affairs. That was at the meeting of September 15th they wanted Mr. Scannell to do the active part for Mr. Henderson, because Mr. Henderson could not be there daily. Mr. Rubinger said he had already consulted Mr. Henderson and Mr. Henderson agreed to that plan; it was signed on

(Testimony of J. M. Henderson, Jr.)

September 15th and was supposed to be in force then. [145]

Mr. SCANNELL.—I understood that meeting was called merely to devise ways and means of continuing the business and that Mr. Henderson was there in an advisory capacity and not as a trustee.

Testimony of J. M. Henderson, Jr.

J. M. HENDERSON, Jr., called as a witness by Mr. A. A. DeLIGNE, testified as follows:

That he is a banker and lives in the City of Sacramento; that he is connected with the Fort Sutter National Bank, City of Sacramento; that he was president of the Fort Sutter National Bank until said bank was merged with the Sacramento-San Joaquin Bank on October 16, 1920, and that he is now president of the Sacramento-San Joaquin Bank, which latter bank is the owner of all of the assets of the Fort Sutter National Bank.

Q. I wish you would state in your own way, Mr. Henderson, everything in relation to the matters that finally culminated in the preparation of the trust agreement, and what was done in connection with the case, how it come to be executed, all that was done in connection with those assets, what was done thereafter; state the entire transaction?

A. What led up to it?

Q. Yes.

A. The Sacramento-San Joaquin Bank had a

(Testimony of J. M. Henderson, Jr.)

loan, a trust deed against the Cowen property.

Q. By the Cowen property, you mean the building of George W. Cowen Company, or as an individual?

A. I mean the building in which George W. Cowen Company had their business. Consequently Mr. Cowen sought my counsel, he seemed to be needing new capital, he had a going business there, and seemed to be doing well. I advised him he ought to get more capital as a working capital, and I told him if he would get fifty thousand dollars, conditional upon his getting the fifty thousand additional working capital, I would take five thousand dollars stock with him. He went East to get the additional capital. He came back from the East with a subscription of the Nathan-Wiener —and one other man whom I can't call the name now,—

Mr. JACOBS.—(Interposing.) Was it Martin Scheline?

A. Yes, sir. He had their notes. He asked that I discount the notes, and represented if I could discount them I could send them to the Metropolitan Bank, [146] New York, for rediscounting, and I accommodated him by discounting the notes. I sent them to the Metropolitan Bank of New York to be rediscounted, to learn that those notes were given him conditionally for subscription stock, the condition being he would at least obtain fifty additional subscriptions. Following that along, Mr. Wiener came out here with Mr. Rubinger, attorney

(Testimony of J. M. Henderson, Jr.)

for Nathan-Wiener-Scheline, and called upon me to say that the notes were obtained under misrepresentation and fraud, and that they had in mind the taking up with the District Attorney the matter of having Mr. Cowen indicted for obtaining money under false representations. I told him all I knew about the transaction. At that time Mr. Sam Jones was attorney for Mr. Cowen, and they got together The next relation I had with them was a visit from Mr. Cowen, Mr. Jones, Mr. Wiener and Mr. Rubinger, who said they had come to an understanding whereby Mr. Cowen was to give them a certain mortgage on the property to settle their trade, and that they wanted to create a trusteeship whereby the creditors would extend time to Mr. Cowen to enable him to either sell the business out, or give him time to get working capital. He asked if I would act as trustee. I first declined, told them I would not act, and they pressed the matter a little bit and said they were confident if I would act they could get the New York creditors to enter into the trustee agreement. Upon them assuring me they could do so, and from the assurance from them that the trusteeship was not to go into effect until after the creditors had signed a trustee agreement, I consented to act as trustee. They then had an understanding, and it was understood with Mr. Cowen he would take the trustee agreement around to the local creditors, and he would have it signed by all the creditors, and that Mr. Pullen, or some other attorney, would take it to

(Testimony of J. M. Henderson, Jr.)

the San Francisco attorney, and that Mr. Rubinger would make it his business to see that the New York creditors signed. So the matter dropped there, so far as I was personally concerned. The trust agreement was drawn and they thought it would be advisable for the trust agreement to be signed by myself and Mr. [147] Scannell, first as trustees, then they would undertake to get them signed up; so Mr. Scannell and I signed the trustee agreement. Mr. Cowen immediately started out to get the Sacramento creditors to sign, and the San Francisco creditors were approached, I don't know, either by Mr. Pullen, or who, I don't know; I know someone took it down. Mr. Rubinger called a meeting of the New York creditors, which was held in New York. Then the next connection I had with it, the Board of Trade of San Francisco sent some man here to audit the books, and when he came down to me, he told me I ought to watch the matter a little bit, that goods were disappearing from the shelves, and that the Cowens were,—Mrs. Cowen was taking dresses out of the store, and that he thought, inasmuch as the trusteeship was going to be created, I ought to have an eye on things a little bit. He assured me San Francisco creditors would sign it, that there had been a covenant between them and the Los Angeles creditors, they would all sign the trust agreement. I told them the trusteeship was not in actual effect, and I would not like to act, but I would call Mrs.

(Testimony of J. M. Henderson, Jr.)

Cowen in and ascertain if that was true, and if it were I would tell her it was a very awkward position she was getting herself in. So I called in Mrs. Cowen, and asked Mrs. Cowen if she was taking these things, dresses, and so forth, from the shelves, and she denied it. I took it up with him and he repeated he knew it was so. So I was helpless to do anything, but on his assurance that the San Francisco creditors and Los Angeles creditors would sign, I called a meeting of Mr. and Mrs. Cowen, Fred Cowen, and Mr. Scannell, outlining the plan of action when the trustee agreement should be signed by all creditors, together with a survey as to how many of the Sacramento creditors had signed it. We had that meeting, it was in the Cowen Building, upstairs in their office, and I impressed upon them that the trustee agreement was not in force and effect, and would not be until Mr. Cowen had obtained all the creditors' signatures. We went over the list of those he had obtained, and those he had not, and we talked it over, how he would run the business, and decided on different lines of action, and left that meeting with the understanding that the [148] Cowens would go to Hale Brothers, and different creditors here, and get them to sign, and after he had done that, more than likely all his creditors would sign. The next day Hale Brothers attached,—served an attachment on me. I said to the constable, "You are serving it on the wrong man; I have absolutely no connection with them at all,

(Testimony of J. M. Henderson, Jr.)

absolutely nothing to do with it." Then Hales satisfied themselves that was the case, and they withdrew the attachment, and Cowen came in. I said to Cowen, "They have served the papers on me, and I have told them I was the wrong person. You better go up and see Hales, and he went up and saw the Hale people, Carpenter and Hale, and they withdrew the attachment right away. Then the next attachment I had with Reich-Lievre, and they had in mind the purchasing of the business, and they were negotiating with Mr. Cowen. That was after this meeting in the building. They wanted to know if the bank would consent to leasing to them, and in the event they bought the business,—of course, I had, from time to time been advising Cowen, they had sought my advice, and this time Mr. Downey was representing them and he sought my consent to the lease and advice as to whether it was advisable to sell to Reich-Lievre. Of course, I done everything I could to encourage to sell to Reich-Lievre, and if they had sold they could have paid out the creditors almost dollar for dollar, and I consented on the part of the Bank to the leasing of the property to Reich-Lievre. Of course, Mr. Cowen had great hopes and prospects, he said, of raising additional capital, and continuing the business himself, and he would not think of selling that business to Reich-Lievre. He refused to sell. So then, finally, after that, why the bankruptcy papers was filed. I at no time had

(Testimony of J. M. Henderson, Jr.)

any thing to do with the conduct of the business. I had from time to time advised the Cowens as to what to do. Mr. Rubinger asked me if I wouldn't kindly advise them when they were in doubt, what to do, and kindly look after the case to see it went along as well as it could. I did that. [149]

Cross-examination.

Mr. Henderson testified on cross-examination by Mr. Henry A. Jacobs that the debit items which were made against the Cowen account by Mr. Robinson were under his personal instructions, which were that Mr. Henderson told Mr. Robinson at that time that the bank had a banker's lien, which statement was made after the agreement of September 15th was signed, and that it was about September 30th when the first debit item appeared; that he instructed Mr. Robinson to debit the account; that he instructed Mr. Robinson to debit the account as fast as the money came in; that he, Mr. Henderson, signed the agreement of September 15th, Trustees' Exhibit Number Nineteen, and that the signature of Mr. Bullock on the agreement on behalf of the Fort Sutter National Bank was correct; that Mr. Bullock was cashier of the bank at that time; that he did not know anything about what the occasion was for cancelling the signature of the Geo. W. Cowen Co., on September 24th, 1920, and that Mr. Bullock was the only person in the bank who would have charge of the cancellation of the signature of a customer; that he

(Testimony of J. M. Henderson, Jr.)

never bothered about the account until about the thirtieth of September, and that he never thought about the bank account until about the thirtieth of September; that it never gave him any concern; that there was no occasion for any officer of the bank to take any action relative to that account up until September, until some time later, because we had every reason to believe Cowen's business would be continued, because we had not regarded him as a bankrupt and still hold he was not bankrupt; that he had no knowledge as to the reason for cancelling the signature of the Geo. W. Cowen Co.; that outside of himself, the other officers in the bank who would have authority to cancel such signature are Mr. Bullock, Mr. Stephens, and, of course, Mr. Robinson. Any of those executive officers could have done it. Mr. Stephens was in charge. Mr. Bullock was cashier and Mr. Robinson was the assistant cashier.

Mr. DeLigne stipulated that if Mr. Stephens were present he would testify that he personally knew nothing whatsoever as to the Cowen account. [150]

(The witness continuing:) Mr. Robinson would have authority as he was the assistant cashier, but as Mr. Bullock cancelled these signatures, he did it on his own initiative and without instructions from Mr. Robinson, and that other than Mr. Stephens, or himself, there would be no one connected with the bank from whom Mr. Bullock would receive

(Testimony of J. M. Henderson, Jr.)

instructions; that this cancellation was not done under his, Henderson's instructions.

The witness further testified that he never saw the minute-book designated as "Trustees' Exhibit Number Twenty-two," and that the minutes kept therein were not kept under his personal instructions.

The witness stated that it was an informal meeting and that the first item referring to the meeting called to order, seven thirty P. M., September twenty-second, by J. M. Henderson, Jr., Trustee, in the office of the George W. Cowen Company, is not all true; that he did not go there as trustee at all and did not call the meeting to order; that he thought they met there on the twenty-second; that he was pretty sure; that the parties mentioned were present; that no motion was made to the effect that, "All orders from which shipments had not been started, Mr. Scannell is to wire cancellation at once"; that there was some goods coming along, and that he advised them that if the goods had not started, they had better return the goods, because they might be prosecuted for it.

The witness further testified that there was no such motion made and no such action taken as stated in the resolution, "That Mr. Scannell be authorized to write and ask Baer and Lilienthal, of New York, to represent George W. Cowen Company, Incorporated, by Trustee"; that there was a discussion as to those items, if the trustees would sign the agreement, some discussion was

(Testimony of J. M. Henderson, Jr.)

had about obtaining some agent in New York to represent the trustees; that he did not know who they were or what they were.

The witness stated that there was no motion made that "Mr. Scannell is authorized to take up means and ways to inaugurate a future [151] sales service for these various departments"; that there may have been a discussion after he left; that he didn't hear it; that he did not hear any discussion relative to future sales.

The witness further stated that the following resolution was not proposed by J. M. Henderson, Jr., seconded by Mr. Scannell: Mr. Kennerley to give Mr. Henderson, Jr., a report of the conditions of the various departments at his request; that that motion wasn't made, no motion made like that. Mr. Kennerley was called in and asked, in the event the trusteeship went into effect, if he could give daily reports out of his book, and audit his book, but no motion was made; that he did not expect to receive daily reports, and that he had not entered into the trusteeship agreement, and that all through that evening he kept impressing upon Mr. Cowen and Mrs. Cowen, and Fred Cowen, all of them, that the trusteeship was not in effect.

The witness further stated that he did not propose a resolution, which was seconded by Mr. Scannell "To meet again Thursday, September twenty-third, seven-thirty P. M., at the office of George W. Cowen Company, Incorporated"; that there was no motion made to that effect; that he

(Testimony of J. M. Henderson, Jr.)

did not order the meeting adjourned; that he was not at a meeting held September 24th, 1920; at seven fifty-five P. M., of which meeting there is a notation in the record book that states, J. Scannell, J. M. Henderson, Jr., Trustees: "All orders and checks to be signed by the Trustees, and the insurance to be charged in the name of the Trustees"; that he has no recollection of any such meeting; that if any of the notations were made at that time, he was not present and was not a party to them.

The witness further stated that the Cowens came to him for advice about employees being allowed their salaries, wanted to know if the employees were entitled to their salaries, and he said that the employees would have to be paid ahead of everybody else; that they were preferred claims, and that as Mrs. Cowen was an employee to draw a check in her favor, and have it go through the bank, and that that is how it [152] came about that the check was given to A. Grace Cowen, on October 22d, 1920, for $250.00, signed by George W. Cowen, President; that he gave them advice; that is substantially what was said; that he has no recollection about stating that Mr. Cowen had no authority to sign checks; he had not discussed with the witness the matter of signature; Mr. Mayhood telephoned to him asking if he should honor that signature, and that he said if it was signed properly to pay the check, that was an employee's check; that he never knew and had no knowledge at all,

(Testimony of J. M. Henderson, Jr.)

even as late as October 22, 1920, that Mr. Cowen's signature was no longer recognized by the bank; that he had no way—no interest in that at all; that he had some information that at the time the assignment was given there were some outstanding postdated checks; that he did not know just the source; that he only knows that Mr. Cowen talked about some postdated checks he had out; that he did not know of any discussion as to the change of the bank account so that the postdated checks would not be paid when presented; that he had no knowledge of the cancellation of Mr. Cowen's signature, and that he had no knowledge at any time prior to October twenty-second that Mr. Cowen's signature would not be recognized at the bank; that he is a pretty busy fellow traveling around the State; that all those months he was out organizing the Milk Producers and wasn't paying much attention to that particular business; that it was fortunate that he had some time on September 30th to telephone Mr. Robinson to debit the account; that the only conversation that he recalls with Mr. Mayhood was over the phone, when he asked him (the witness) whether he should pay that check; that he did not give any reason why he didn't want to pay it or why he wanted to ask him about it; that he might have said that the check was signed by Mr. Cowen; that he could not recall; it was a long time ago; that he did not recall having had any other dis-

(Testimony of J. M. Henderson, Jr.)

cussions with anyone in the bank relative to the checking out of the Cowen money.

The witness further testified as follows: All discussions I had with the Bank, Mr. Jacobs, was the instructions [153] to Mr. Robinson. I don't think I discussed the Cowen account with anybody except the instructions I gave Mr. Robinson and Mr. Holland when I found a mistake had been made in the account. Those are the two men I done business with. [154]

Stipulation as to Statement on Appeal.

It is hereby stipulated that the foregoing is a full, true and correct statement of the evidence and proceedings in the above-entitled cause; and

It is FURTHER stipulated that the same may be filed without further notice and that the same may be used on the appeal in the above-entitled matter and also upon the petition of J. M. Henderson, Jr. and T. J. Scannell to correct errors of law in said proceeding.

Dated: August 23d, 1922.

HENRY A. JACOBS,
HENRY G. W. DINKELSPIEL,
G. B. BLANCKENBURG,

Solicitors for A. L. May, Trustee in Bankruptcy.

ARCHIBALD M. JOHNSON,
A. A. DeLIGNE,

Solicitors for J. M. Henderson, Jr., and T. J. Scannell.

The foregoing statement has been read by me and found correct.

S. W. CROSS,
Referee in Bankruptcy.

The foregoing statement is hereby approved.

E. S. FARRINGTON,
Judge.

[Endorsed]: Filed at 11 o'clock and 20 min. A. M. Sep. 2, 1922. Walter B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [155]

In the Northern Division of the United States District Court for the Northern District of California.

No. 495.

In the Matter of GEO. W. COWEN CO., INC., a Corporation, Bankrupt.

Certificate of Clerk U. S. District Court to Record on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States for the Northern District of California, certify that the foregoing one hundred and fifty-five (155) pages, numbered from 1 to 155, inclusive, contain a full, true and correct Transcript of certain records and proceedings, In the Matter of Geo. W. Cowen Co., Inc., a Corporation, Bankrupt, number 495—Bk., as the same remain on file and of record in the office of the Clerk of said District Court; said transcript having been prepared pursuant to and in accordance with

"Praecipe" (a copy of which is embodied in this transcript), and the instructions of the attorneys for the appellant herein.

I further certify that the costs for preparing and certifying the foregoing transcript on appeal is the sum of Eighty-four Dollars and Fifty Cents ($84.50), and that the same has been paid to me by the attorneys for appellants herein.

Annexed hereto is the original citation on appeal (pages 157 and 158), with the return of the attorneys for the appellee thereto (page 158).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 29th day of September, A. D. 1922.

[Seal] WALTER B. MALING,
Clerk.
By Thomas J. Franklin,
Deputy Clerk. [156]

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to A. L. May, Trustee in Bankruptcy of the Estate of Geo. W. Cowen Company, Inc., Bankrupt, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's

office of the United States District Court for the Northern District of California, First Division, wherein J. M. Henderson, Jr., and T. J. Scannell, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 18th day of March, A. D. 1922.

WM. C. VAN FLEET,
United States District Judge. [157]

Due service of a copy of the within citation on this 18th day of March, 1922, hereby admitted.

HENRY A. JACOBS,
G. B. BLANCKENBURG,
HENRY G. W. DINKELSPIEL,
Attorneys for Trustee.

[Endorsed]: No. 495—In Bankruptcy—No.——. In the Northern Division of the District Court of the United States, for the Northern District of California, First Division. In the Matter of the Estate of Geo. W. Cowen Co., Inc., Bankrupt. Citation on Appeal. Filed Apr. 17, 1922, at 4:45 o'clock P. M. W. B. Maling, Clerk. By Thomas J. Franklin, Dep. Clerk. [158]

In the United States Circuit Court of Appeals, for the Ninth District.

IN BANKRUPTCY—No. 3843.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

Stipulation and Order Extending Time to and Including June 1, 1922, to Prepare Statement on Appeal and File Praecipe.

IT IS HEREBY STIPULATED that the appellants may have to and including the 1st day of June, 1922, to prepare their statement on appeal as required by the rules of practice for courts of equity of the United States (Rules 75, 76 and 77) and to file their praecipe in the above-entitled cause.

Dated: April 13th, 1922.

ARCHIBALD M. JOHNSON,
A. A. DeLIGNE,
Attorneys for Appellant.

HENRY A. JACOBS,
G. B. BLANCKENBURG,
HENRY G. W. DINKELSPIEL,
Attorneys for Appellee.

It is so ordered.

Dated: April 15, 1922.

W. H. HUNT,
Judge.

[Endorsed]: Filed April 15, 1922, at 1:05 P. M. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [159]

In the United States Circuit Court of Appeals, for the Ninth District.

IN BANKRUPTCY—No. 3843.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

Stipulation and Order Extending Time to and Including June 8, 1922, to Prepare Statement on Appeal and File Praecipe.

IT IS HEREBY STIPULATED that the appellants may have to and including the 8th day of June, 1922, to prepare their statement on appeal as required by the rules of practice for courts of equity of the United States (Rules 75, 76 and 77), and to file their praecipe in the above-entitled cause.

Dated: June 1, 1922.

ARCHIBALD M. JOHNSON,
A. A. DeLIGNE,
Attorneys for Appellants.
HENRY A. JACOBS,
G. B. BLANCKENBURG,
Attorneys for Appellee.

It is so ordered.

Dated: June 2, 1922.

M. T. DOOLING,
Judge.

[Endorsed]: Filed at 12 o'clock and 30 min. P. M. June 2, 1922. W. B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [160]

In the Northern Division of the United States District Court, in and for the Northern District of California, First Division.

IN BANKRUPTCY—No. 495.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

Stipulation and Order Extending Time to and Including June 15, 1922, to Prepare Statement on Appeal and File Praecipe.

IT IS HEREBY STIPULATED that the appellants may have to and including the 15th day of June, 1922, to prepare their statement on appeal as required by the rules of practice for courts of equity of the United States (Rules 75, 76 and 77), and to file their praecipe in the above-entitled cause.

Dated: June 5th, 1922.

ARCHIBALD M. JOHNSON,
A. A. DeLIGNE,
Attorneys for Appellant.
HENRY A. JACOBS,
G. B. BLANCKENBURG,
Attorneys for Appellee.

It is so ordered.

Dated: June 6, 1922.

M. T. DOOLING,
Judge.

[Endorsed]: Filed at 11 o'clock and — min. A. M. June 6, 1922. W. B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [161]

In the District Court of the United States, in and for the Northern Division of the Northern District of California.

No. 495—IN BANKRUPTCY.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

Stipulation and Order Extending Time to and Including June 28, 1922, to Prepare Statement on Appeal and File Praecipe.

It is hereby stipulated by and between the parties hereto that the time heretofore granted by stipulation to J. M. Henderson, Jr., and T. J. Scannell, trustees, is hereby extended to and including June 28th, 1922, for the purposes heretofore stipulated.

Dated: June 13, 1922.

HENRY A. JACOBS,
HENRY G. W. DINKELSPIEL,
Attorneys for Trustee in Bankruptcy.
ARCHIBALD M. JOHNSON,
A. A. DeLIGNE,
Attorneys for Trustees Henderson and Scannell.

It is so ordered:

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed June 14, 1922, at 9 o'clock A. M. W. B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [162]

In the District Court of the United States, in and for the Northern Division of the Northern District of California.

No. 495—IN BANKRUPTCY.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

Stipulation and Order Extending Time to and Including July 28, 1922, to Prepare Statement on Appeal and File Praecipe.

It is hereby stipulated by and between the parties hereto that the time heretofore granted by stipulation to J. M. Henderson, Jr., and T. J. Scannell, trustees, is hereby extended to and including July 28th, 1922, for the purposes heretofore stipulated.

Dated: June 26, 1922.

HENRY A. JACOBS,
HENRY G. W. DINKELSPIEL,
G. B. BLANCKENBURG,
Attorneys for Trustee in Bankruptcy.
ARCHIBALD M. JOHNSON,
A. A. DeLIGNE,
Attorneys for Trustees Henderson and Scannell.

It is so ordered:

M. T. DOOLING,
Judge.

[Endorsed]: Filed at 11 o'clock and — min. A. M. June 26, 1922. W. B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [163]

In the District Court of the United States, in and for the Northern Division of the Northern District of California.

No. 495—IN BANKRUPTCY.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

Stipulation and Order Extending Time to and Including August 15, 1922, to Prepare Statement on Appeal and File Praecipe.

IT IS HEREBY STIPULATED by and between the parties hereto that the time heretofore granted by stipulation to J. M. Henderson, Jr., and T. J. Scannell, trustees, is hereby extended to and including August 15th, 1922, for the purposes heretofore stipulated.

Dated: July 25, 1922.

HENRY A. JACOBS,
G. B. BLANCKENBURG,
Attorneys for Trustee in Bankruptcy.
ARCHIBALD M. JOHNSON,
A. A. DeLIGNE,
Attorneys for Trustees Henderson and Scannell.

It is so ordered:

WM. M. MORROW,
Judge.

[Endorsed]: Filed at 11 o'clock and — min. A. M. July 25, 1922. W. B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [164]

In the District Court of the United States, in and for the Northern Division of the Northern District of California.

No. 495—IN BANKRUPTCY.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

Stipulation and Order Extending Time to and Including September 15, 1922, to Prepare Statement on Appeal and File Praecipe.

IT IS HEREBY STIPULATED by and between the parties hereto that the time heretofore granted by stipulation to J. M. Henderson, Jr., and T. J. Scannell, trustees, is hereby extended to and including September 15, 1922, for the preparation and filing of Statement on Appeal and for all the purposes heretofore stipulated.

Dated: August 11th, 1922.

HENRY A. JACOBS,
G. B. BLANCKENBURG,
Attorneys for Trustee in Bankruptcy.
ARCHIBALD M. JOHNSON,
A. A. DeLIGNE,
Attorneys for Trustees Henderson and Scannell.

It is so ordered:

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed at 9 o'clock A. M. Aug. 12, 1922. W. B. Maling, Clerk. By Thomas J. Franklin, Dep. Clerk. [165]

In the District Court of the United States, in and for the Northern Division of the Northern District of California.

No. 495—IN BANKRUPTCY.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

Stipulation and Order Extending Time to and Including October 1, 1922, to Prepare Statement on Appeal and File Praecipe.

IT IS HEREBY STIPULATED by and between the parties hereto that the time heretofore granted by stipulation to J. M. Henderson, Jr., and T. J. Scannell, trustees, is hereby extended to and including October 1, 1922, for the preparation and filing of the statement on appeal and for all the purposes heretofore stipulated.

Dated: September 14th, 1922.

HENRY A. JACOBS,
G. B. BLANCKENBURG,
Attorneys for Trustees in Bankruptcy.
ARCHIBALD M. JOHNSON,
A. A. DeLIGNE,
Attorneys for Trustees Henderson and Scannell.

It is so ordered:

M. T. DOOLING,
Judge.

[Endorsed]: Filed at 11 o'clock and — min. A. M. Sep. 15, 1922. W. B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [166]

[Endorsed]: No. 3843. United States Circuit Court of Appeals for the Ninth Circuit. J. M. Henderson, Jr., and T. J. Scannell, Appellants, vs. A. L. May, as Trustee in Bankruptcy of the Estate of Geo. W. Cowen Company, Inc., Bankrupt, Appellee. Transcript of Record. Upon Appeal from the Northern Division of the United States District Court for the Northern District of California.

Filed October 2, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

[Endorsed]: No. 3843. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Geo. W. Cowen Co., Inc., a Corporation, Bankrupt. J. M. Henderson, Jr., and T. J. Scannell, Petitioners. A. L. May, as Trustee in Bankruptcy of George W. Cowen Company, Incorporated, Respondent. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the Northern Division of the United States District Court for the Northern District of California, First Division.

Filed March 17, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

IN BANKRUPTCY—No. 3843.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

Stipulation and Order Extending Time to and Including June 1, 1922, to File Record and Docket Cause.

IT IS HEREBY STIPULATED that the petitioner in the above-entitled cause may have to and including the 1st day of June, 1922, to file the record and docket said cause.

Dated: April 13th, 1922.

HENRY A. JACOBS,
G. B. BLANCKENBURG,
HENRY G. W. DINKELSPIEL,
Attorneys for A. L. May, Referee in Bankruptcy of Geo. W. Cowen Co., Inc., Respondent.

ARCHIBALD M. JOHNSON and
A. A. DeLIGNE,
Attorneys for Petitioner.

It is so ordered.

April 15, 1922.

W. H. HUNT,
Judge.

[Endorsed]: In Bankruptcy—No. 3843. In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Geo. W. Cowen Co., Inc., Bankrupt. Stipulation. Filed Apr. 15, 1922. F. D. Monckton, Clerk.

[Endorsed]: Printed Petition for Revision. Filed October 20, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

No. 3843

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of GEO. W. COWEN CO., INC., a Corporation, Bankrupt.

J. M. HENDERSON, Jr., and T. J. SCANNELL,

Petitioners,

vs.

A. L. MAY, as Trustee in Bankruptcy of GEORGE W. COWEN COMPANY, INCORPORATED,

Respondent,

and

J. M. HENDERSON, Jr., and T. J. SCANNELL,

Appellants,

vs.

A. L. MAY, as Trustee in Bankruptcy of the Estate of GEO. W. COWEN COMPANY, INC., Bankrupt,

Appellee.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the Northern Division of the United States District Court for the Northern District of California,

and

Upon Appeal from the Northern Division of the United States District Court for the Northern District of California.

PROCEEDINGS HAD IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1922, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fifth day of March, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Honorable WILLIAM W. MORROW, Circuit Judge; Honorable FRANK H. RUDKIN, Circuit Judge.

No. 3843.

J. M. HENDERSON, Jr., et al.,
Petitioners and Appellants,
vs.
A. L. MAY, as Trustee, etc.,
Respondents and Appellee.

Order of Submission.

By consent of counsel for the respective parties, ORDERED above-entitled matter submitted to the Court for consideration and decision on briefs.

At a stated term, to wit, the October Term, A. D. 1922, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the seventh day of May, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable FRANK H. RUDKIN, Circuit Judge.

No. 3843.

J. M. HENDERSON, Jr., et al.,
Petitioners and Appellants,
vs.
A. L. MAY, as Trustee, etc.,
Respondents and Appellee.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN DECREES.

By direction of the Honorable William B. Gilbert, William W. Morrow, and Frank H. Rudkin, Circuit Judges, before whom the causes were heard, ORDERED that the typewritten opinion this day rendered by this Court in each of the above-entitled causes be forthwith filed by the Clerk, and that a decree be filed and recorded in the minutes

of this Court in each of the causes in accordance with the opinion filed therein: * * * J. M. Henderson, Jr., et al., vs. A. L. May, as Trustee in Bankruptcy of George W. Cowen & Co., Incorporated, Respondent.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3843.

In the Matter of GEO. W. COWEN CO., INC., a Corporation, Bankrupt.

J. M. HENDERSON, Jr., and T. J. SCANNELL,
Petitioners,

vs.

A. L. MAY, as Trustee in Bankruptcy of GEORGE W. COWEN CO., INCORPORATED,
Respondent.

and

J. M. HENDERSON, Jr., and T. J. SCANNELL,
Appellants,

vs.

A. L. MAY, as Trustee in Bankruptcy of the Estate of GEO. W. COWEN CO., INC., Bankrupt.

Appellee.

Opinion U. S. Circuit Court of Appeals.

PETITION FOR REVISION

and

UPON APPEAL FROM THE NORTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Before GILBERT, MORROW and RUDKIN, Circuit Judges.

RUDKIN, Circuit Judge:

This is a petition to revise an order of the Court below, affirming an order of the referee, directing the respondents to pay over to the trustee in bankruptcy the sum of $12,883.81. The material facts are as follows: Geo. W. Cowen Co., Inc., made a general assignment for the benefit of creditors on the 15th day of September, 1920, naming the respondents as assignees. At that time the assignor was indebted to the Fort Sutter National Bank in the sum of $15,000 on a promissory note, and carried a deposit account in the bank. The business of the assignor was continued by the assignees from the date of the assignment until the appointment of a bankruptcy receiver on November 4, 1920. The deposit account in the bank was changed from the name of the assignor to the names of the assignees, as trustees, and further deposits were made by the assignees from time to time in the conduct of the

business. On the 12th day of October, 1920, an involuntary petition was filed against the assignor. This was followed by adjudication and reference on November 3d, and by the appointment of a receiver on November 4th. On the 28th day of February, 1921, the trustee petitioned the bankruptcy court for an order requiring the respondents, as assignees, to account for and pay over all moneys received by them from the date of the assignment up to the date of the appointment of the receiver. Proceedings on this petition resulted in the orders now complained of. The amount named in the orders is the exact amount that would have stood in the names of the assignees in the deposit account in the Fort Sutter National Bank if no diversion had been made therefrom. But on September 30, 1920, a debit of $4,516.40 was made against the deposit account by the bank, and a like amount was credited as a payment on the $15,000 note of the bankrupt held by the bank. On various dates between October 13th and October 25th, other debits were made against the deposit account in like manner, and the amounts credited on the note of the bankrupt as before. By this means the deposit account was practically, if not entirely, depleted. All these transfers were made by direction of the respondent, Henderson, who was president of the bank as well as one of the assignees. The answer of the respondents avers that the bank asserts the right to hold the deposit account and apply it as a partial setoff against the note of the bankrupt; that the claim of the bank is made in

good faith; and that the respondents are without lawful right or power to retake the money or comply with the order if made. When a debtor who has made a general assignment for the benefit of his creditors is adjudged a bankrupt, within four months thereafter the court of bankruptcy has jurisdiction in a summary proceeding to make an order requiring the assignee to submit his accounts and turn over to the trustee in bankruptcy all money and property in his hands. "This power, however, is far-reaching and drastic, and must be exercised with cautious discretion. If the bankrupt denies that he has possession or control of the property, or, if a third person in possession thereof claims to hold it, not as the agent or representative of the bankrupt, but by title adverse to him, and there is no evidence to indisputably show that such denial is false or fraudulent, and that the case is one of simple concealment or refusal on the part of the bankrupt, or the one in possession, to deliver up the property as ordered, it would be an unwarranted stretch of power on the part of the Court to resort to a summary proceeding for contempt for the enforcement of its order. In the absence of fraud or concealment, the bankrupt court can only order the delivery of property to the trustee which the bankrupt is physically able to deliver up, having the same in his possession or control. If it shall appear that he is not physically able to deliver the property required by the order, then, confessedly, proceedings for contempt, by fine and imprisonment would result in nothing, cer-

tainly not in a compliance with the order. The contempt in this case could only be purged by a reiteration of the physical impossibility to comply with the order whose disobedience is being thus punished. An order made under such circumstances would be as absurd as it is inconsistent with the principles of individual liberty. But it may be said that, to have collected this money from his debtors and distributed it to his creditors, with knowledge of the filing of the petition in bankruptcy, was in contempt of the bankrupt law and of the proceedings in bankruptcy, which were a caveat to all the world as to the effect of such proceedings upon the property of the bankrupt in case he should be so declared. This, however, would be but a constructive contempt, and not liable to the summary punishment by fine and imprisonment which may be inflicted for actual contempt, committed in the presence of the court or by open and defiant refusal to comply with its lawful commands, where compliance is physically possible.

"The bankruptcy court is clothed with power, when the circumstances appear to it to warrant such proceedings, to have the bankrupt's property seized by a marshal or special master, immediately upon the filing of the petition in bankruptcy. This power is a summary one, and can be exercised upon an *ex parte* suggestion, and was intended to meet the inconvenience suggested by appellant, of allowing the property of the bankrupt to remain in his possession and control and liable to be unlawfully made away with or concealed in the interval be-

tween the filing of the petition and the appointment of a trustee. A provision of this kind, however, cannot always perfectly protect the creditors in their right to have the whole estate of the bankrupt segregated and guarded for their benefit. It does so as nearly as it can, with due regard to the fundamental principles and policies. It is better to fall short of an absolutely perfect administration of the theory of the bankrupt law, than to arm referee or Court with powers of oppression alien to the spirit of our laws and institutions. A careful examination of the authorities cited by the appellant discloses no case which would justify the making of the order asked for by the appellant." American Trust Co. vs. Wallis, 126 Fed. 464, 466. The same rule has been applied to assignees for the benefit of creditors. As said by the Court in Sinsheimer vs. Simonson, 107 Fed. 898, 908: "The confirmation by the Court affirmed the insufficiency of these facts to excuse the respondent from paying over the money, and the Court thereupon ordered him to pay it before a day named. With these adjudications behind him, there was nothing to follow but imprisonment, from which there could be no prospect of relief but by reiteration of the same facts, which would be unavailing. But it is well settled that a showing made by a respondent that he is unable to do an act required of him upon an order to show cause is a sufficient answer. It matters not, for the purpose of such a proceeding, that the inability to do the thing required may be in consequence of his own fault, arising from a

mere misconception of his rights, or committed before the Court took jurisdiction of the matter. The Court cannot compel an impossibility. * * * Other remedies may exist for punishing the petitioner, if there is ground for it, or for establishing a civil liability, if the necessary facts exist. The result is that the orders of the referee adjudging the responses of the petitioner insufficient, and the order of the Court confirming the same, must be set aside." This decision was later affirmed by the Supreme Court, Louisville Trust Co. vs. Cominger, 184 U. S. 18. We have quoted from these cases at length because they are in harmony with the decisions of the Supreme Court, and state very clearly the limitations upon the jurisdiction of bankruptcy courts in summary proceedings.

Let us apply the law as thus declared to the facts of this case. The referee has found that the money is still in the possession and under the control of the respondents. If this finding is supported by competent testimony we are bound by it. But if it is a mere unwarranted conclusion from the facts we must disregard it. When the money on deposit was applied on the note of the bankrupt with the consent of the assignees, the application constituted a partial payment of the note as fully as if the assignees had given their check or withdrawn the money from the bank and paid it back over the counter. And as soon as the application was made the money passed into the possession and under the control of the bank, and out of the possession and beyond the control of the

respondents. To hold otherwise is to hold that entries in the books of a national bank are mere formalities, and may be changed at will. This conclusion would seem self-evident as to the respondent Scannell, who has no connection whatever with the bank, and no control over its funds. But it is equally true as to the respondent Henderson. While he is, or at least was, the president of the bank, funds in the bank are not his funds, nor are they subject to his order or control, and an order directing him to pay over money is not an order against the bank, and it is not binding upon the bank. We are not concerned, of course, with the validity of the claim asserted by the bank. We are only concerned with its existence. It is conceded that the money is now in the custody of the bank and under its control; it is likewise conceded that the respondents have no deposit account in the bank, and we find nothing in the record which justifies the conclusion that the bank holds the money as a mere agent of the respondents, or in any other capacity, or for any other purpose than that stated in the answer. In other words, we find nothing in the record to impeach the claim of the respondents that the bank claims the money by title adverse to them, and that the money is not now in their possession or under their control.

The order, must, therefore, be reversed. The case was brought here by both appeal and petition for revision, but the latter is the proper procedure. Kirsner vs. Taliaferro, 107 Fed. 51. The appeal is therefore dismissed, and the order reversed.

[Endorsed]: Opinion. Filed May 7, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3843.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

J. M. HENDERSON, Jr., and T. J. SCANNELL, Petitioners and Appellants,

vs.

A. L. MAY, as Trustee in Bankruptcy of GEORGE W. COWEN COMPANY, INCORPORATED,

Respondent and Appellee.

Judgment U. S. Circuit Court of Appeals.

Petition for Revision, under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, of an Order of the Northern Division of the United States District Court for the Northern District of California, First Division, and upon Appeal.

The above-entitled matter came on to be heard on the said Petition for Revision, and on the transcript of the record filed in support thereof, and was duly submitted to the Court for consideration and decision:

On Consideration Whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this matter be, and hereby is reversed, with costs in favor of the petitioners and against the respondent.

It is further ordered and adjudged by this Court that the appeal in this matter be, and hereby is dismissed.

It is further ordered and adjudged by this Court that the petitioners recover against the respondent for their costs herein expended, and have execution therefor.

[Endorsed]: Judgment. Filed and entered May 7, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October Term, A. D. 1922, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the eighteenth day of June, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable WILLIAM H. HUNT, Circuit Judge, Presiding; The Honorable WILLIAM W. MORROW, Circuit Judge; The Honorable FRANK H. RUDKIN, Circuit Judge.

No. 3843.

J. M. HENDERSON, Jr., and T. J. SCANNELL,
Petitioners,

vs.

A. L. MAY, as Trustee in Bankruptcy, etc.,
Respondent.

Order Denying Petition for Rehearing.

On consideration thereof, and by direction of the Honorable William B. Gilbert, William W. Morrow, and Frank H. Rudkin, Circuit Judges, before whom the cause was heard, it is ORDERED that the petition, filed June 6, 1923, on behalf of the respondent for a rehearing of the above-entitled cause be, and hereby is denied.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3843.

In the Matter of GEO. W. COWEN CO., INC. (a Corporation),

Bankrupt.

J. M. HENDERSON, Jr., and T. J. SCANNELL,
Petitioners,

vs.

A. L. MAY, as Trustee in Bankruptcy of GEO. W. COWEN CO., INC.,

Respondent,

and

J. M. HENDERSON, Jr., and T. J. SCANNELL,
Appellants,

vs.

A. L. MAY, as Trustee in Bankruptcy of the Estate of GEO. W. COWEN CO., INC., Bankrupt,
Appellee.

Order Staying Issuance of Mandate.

Good cause appearing therefor, on application and motion of Henry A. Jacobs, Henry G. W. Dinkelspiel, G. B. Blanckenburg and Martin Dinkelspiel, solicitors for petitioner, A. L. May, as trustee in bankruptcy of Geo. W. Cowen Co., Inc., Bankrupt,—

IT IS ORDERED that the issuance of the mandate of this court in the above-entitled matter, due to issue under Rule 32 on the 23d day of June, 1923, be stayed for a period of thirty (30) days to and including the 23d day of July, 1923, and that if within the aforesaid time of thirty days said A. L. May, trustee in bankruptcy of Geo. W. Cowen Co., Inc., a corporation, bankrupt, shall have docketed his petition for a writ of certiorari to the Supreme Court of the United States, the issuance of said mandate shall be further stayed until the said petition for a writ of certiorari shall have been considered and acted upon by the said Supreme Court.

Dated, June 22d, 1923.

FRANK H. RUDKIN,
United States Circuit Judge.

[Endorsed]: Order Staying Issuance of Mandate. Filed June 22, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3843.

In the Matter of GEO. W. COWEN CO., INC., a Corporation, Bankrupt.

J. M. HENDERSON, Jr., and T. J. SCANNELL,
Petitioners,

vs.

A. L. MAY, as Trustee in Bankruptcy of GEORGE W. COWEN COMPANY, INCORPORATED,
Respondent,

and

J. M. HENDERSON, Jr., and T. J. SCANNELL,
Appellants,

vs.

A. L. MAY, as Trustee in Bankruptcy of the Estate of GEO. W. COWEN COMPANY, INC., Bankrupt,
Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Record Under Section 3 of Rule 37 of the Rules of the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred

and thirty-one (231) pages, numbered from and including 1 to and including 231, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the respondent, and certified under section 3 of Rule 37 of the rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 28th day of June, A. D. 1923.

[Seal]

F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

WRIT OF CERTIORARI AND RETURN—Filed Nov. 7, 1923

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which J. M. Henderson, Jr., and T. J. Scannell are petitioners, and A. L. May, as Trustee in Bankruptcy of George W. Cowen Company, Incorporated, is respondent, No. 3843, which suit was removed into the said Circuit Court of Appeals by virtue of a petition to revise an order of the District Court of the United States for the Northern District of California, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the seventeenth day of October, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[File endorsement omitted.]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

STIPULATION ON RETURN TO WRIT OF CERTIORARI—Filed Oct. 31, 1923

It is hereby stipulated by and between J. M. Henderson, Jr. and T. J. Scannell, and Messrs. Archibald M. Johnson and A. A. De Ligne, their attorneys, and A. L. May, as trustee in bankruptcy of Geo. W. Cowen Co., Inc. (a corporation), Bankrupt, and Messrs. Henry A. Jacobs, Henry G. W. Dinkelspiel, G. B. Blanckenburg and Martin Dinkelspiel, his attorneys, that the transcript of record heretofore filed with the Supreme Court of the United States upon application for writ of certiorari to the United States Circuit Court of Ap-

peals for the Ninth Circuit may and shall be taken as a return to the writ of certiorari heretofore issued by said Supreme Court.

Dated, October 30, 1923.

Archibald M. Johnson, A. A. De Ligne, Attorneys for J. M. Henderson, Jr., and T. J. Scannell. Henry A. Jacobs, Henry G. W. Dinkelspiel, G. B. Blanckenburg, Martin Dinkelspiel, Attorneys for A. L. May, as Trustee in Bankruptcy of Geo. W. Cowen Co., Inc.

[File endorsement omitted.]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS TO STIPULATION AS TO RETURN TO WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE UNITED STATES

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the preceding pages to be a full, true and correct copy of a "Stipulation on Return to Writ of Certiorari," filed in the above entitled cause on the 31st day of October, A. D. 1923, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 31st day of October, A. D. 1923.

F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

RETURN TO WRIT OF CERTIORARI

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of said Court, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said Writ and send to the said Supreme Court a certified copy of a "Stipulation on Return to Writ of Certiorari," in which said stipulation it is provided

that the certified Transcript of the Record heretofore filed by the respondent and appellee in said cause in the said Supreme Court as a part of its petition for a Writ of Certiorari may be taken as the Return to the said Writ of Certiorari, the original of which stipulation was filed in my office on the 31st day of October, A. D. 1923.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 31st day of October, A. D. 1923.

F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.
[Seal United States Circuit Court of Appeals, Ninth Circuit.]

[File endorsement omitted.]

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1923

No. [redacted]126

JUL 24 1923
W. R. STANSBURY
CLERK

In the Matter of Geo. W. Cowen Co., Inc., Bankrupt.

A. L. MAY, as Trustee in Bankruptcy of Geo. W. Cowen Co., Inc. (a corporation), Bankrupt,

Petitioner,

vs.

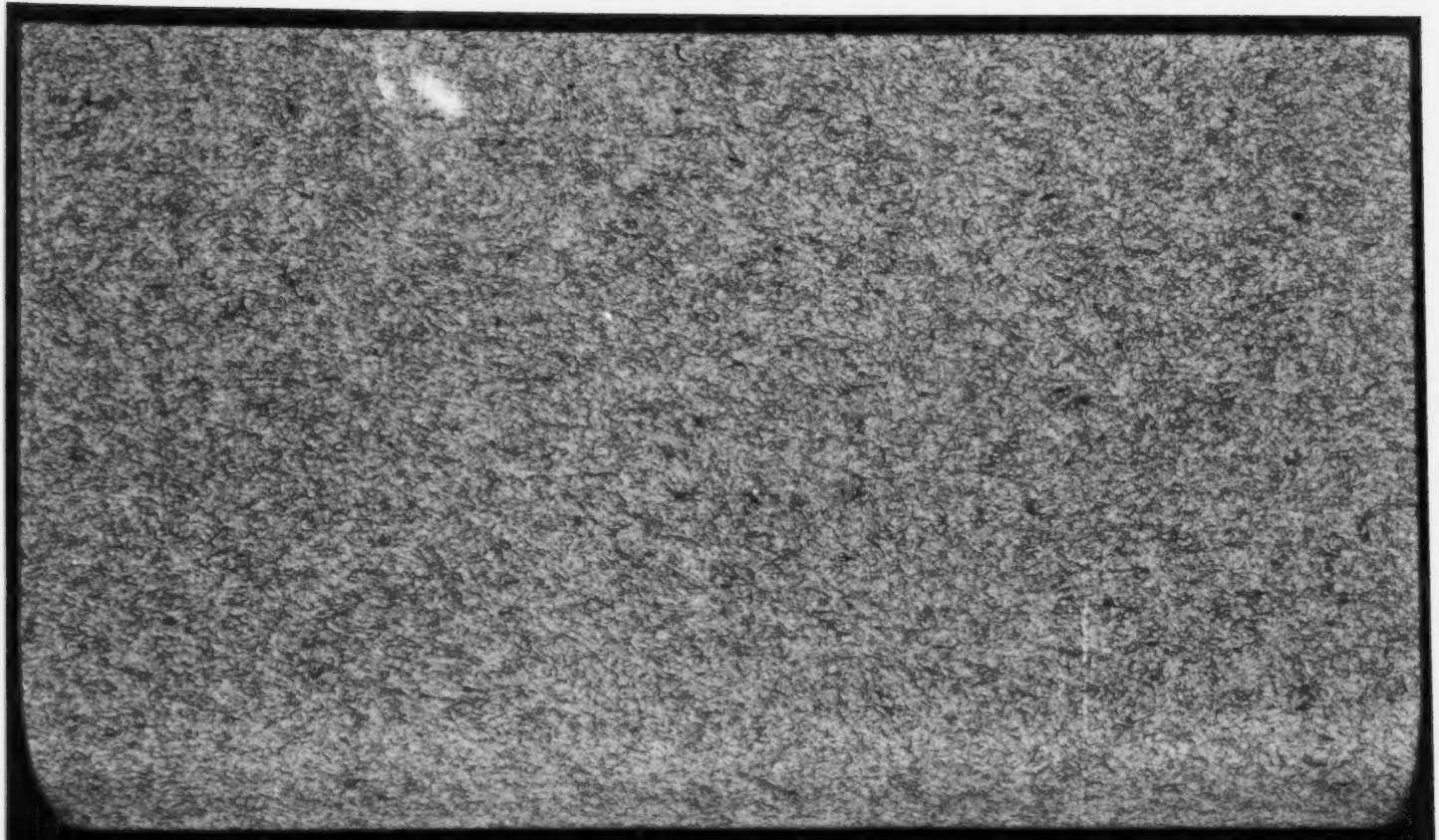
J. M. HENDERSON, Jr. and T. J. SCANNELL,

Respondents.

NOTICE OF MOTION, MOTION, PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit,
and
BRIEF IN SUPPORT THEREOF.

HENRY G. W. DINKELSPIEL,
Chronicle Building, San Francisco,
Attorney for Petitioner.

HENRY A. JACOBS,
G. B. BLANCKENBURG,
First National Bank Building, San Francisco,
MARTIN J. DINKELSPIEL,
Chronicle Building, San Francisco,
Of Counsel.



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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1923

No.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

A. L. MAY, as Trustee in Bankruptcy of Geo. W. Cowen Co., Inc. (a corporation), Bankrupt,

Petitioner,

vs.

J. M. HENDERSON, JR. and T. J. SCANNELL,

Respondents.

NOTICE OF APPLICATION TO THE SUPREME COURT FOR WRIT OF CERTIORARI.

The respondents are hereby notified that the petitioner will on Monday, the first day of October, 1923, upon his verified petition and a copy of the tran-

script of the entire record in this case, at the opening of the court on that day or as soon thereafter as counsel can be heard, submit a motion, a copy of which and of the petition for writ of certiorari and brief in support thereof are herewith delivered to you, to the Supreme Court of the United States in its court-room at the Capitol, in the City of Washington, D. C.

Dated, San Francisco, California,
July 18, 1923.

HENRY G. W. DINKELSPIEL,
Attorney for Petitioner.

HENRY A. JACOBS,
G. B. BLANCKENBURG,
MARTIN J. DINKELSPIEL,
Of Counsel.

The foregoing notice is hereby accepted, and delivery of a copy thereof, and of the petition for writ of certiorari and brief in support of the petition and of the entire record in this cause, is hereby acknowledged.

Dated, San Francisco, California,
July 18, 1923.

ARCHIBALD M. JOHNSON,
A. A. DELIGNE,
Attorneys for Respondents.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1923

No.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

A. L. MAY, as Trustee in Bankruptcy of Geo. W. Cowen Co., Inc. (a corporation), Bankrupt,

Petitioner,

vs.

J. M. HENDERSON, JR. and T. J. SCANNELL,

Respondents.

MOTION FOR WRIT OF CERTIORARI
from the Supreme Court
to the United States Circuit Court of Appeals
for the Ninth Circuit.

Comes now A. L. May, as trustee in bankruptcy of Geo. W. Cowen Co., Inc., a corporation, bankrupt,

by Henry G. W. Dinkelspiel, his counsel, and moves this Honorable Court that it shall by certiorari or other process directed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, require said court to certify to this court for its review and determination a certain cause in said Court of Appeals lately pending, wherein J. M. Henderson, Jr. and T. J. Scannell were petitioners, and your petitioner, A. L. May, as trustee in bankruptcy of Geo. W. Cowen Co., Inc., a corporation, was respondent, and to that end he now tenders herewith his petition and brief with a certified copy of the transcript of the entire record in said cause in said Circuit Court of Appeals.

Dated, San Francisco, California,
July 18, 1923.

HENRY G. W. DINKELSPIEL,
Counsel.

HENRY A. JACOBS,
G. B. BLANCKENBURG,
MARTIN J. DINKELSPIEL,
Of Counsel.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1923

No.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

A. L. MAY, as Trustee in Bankruptcy of Geo. W. Cowen Co., Inc. (a corporation), Bankrupt,

Petitioner,

vs.

J. M. HENDERSON, JR. and T. J. SCANNELL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit requiring it to certify to the Supreme Court

of the United States for its revision and determination the petition for review in bankruptcy taken by said J. M. Henderson, Jr. and T. J. Scannell against A. L. May as trustee in bankruptcy of Geo. W. Cowen Co., Inc., a corporation, bankrupt, lately pending in said Court of Appeals.

To the Honorable William Howard Taft, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petition of A. L. May, as trustee in bankruptcy of Geo. W. Cowen Co., Inc., a corporation, bankrupt, filed under the provisions of Section 25-d of the Bankruptcy Act of 1898 and the amendments thereof, respectfully represents as follows:

First: This cause involves a question entirely novel and one of the most vital importance arising under the Act of 1898—a question of far reaching importance to mercantile and business interests. Upon its determination by this court depends to a large extent the usefulness of said Act, and an authoritative determination thereupon by this court is necessary for a uniform interpretation of the Act.

Second: The questions involved are co-related and are as follows:

(a) Can assignees for the benefit of creditors (under a written assignment within four months prior to bankruptcy) evade the consequences of summary proceedings and deprive the bankruptcy court of jurisdiction to summarily order them to

turn over funds coming into their possession to the trustee in bankruptcy, when by their own wrongful acts they attempt to divest themselves of the control of such funds?

(b) Is an assignee for the benefit of creditors answerable in summary proceedings, when in his dual capacity as president of a creditor bank of the bankrupt, he causes the records of the bank to be changed, to indicate that the funds, which he has deposited with such bank as assignee, shall be shown as credited to another account, for the purpose of enabling the misappropriation of such funds?

The Geo. W. Cowen Co., Inc., bankrupt herein, conducted a ladies' ready to wear department store at Sacramento, California. It had a bank account with the Fort Sutter National Bank, since succeeded by the Sacramento-San Joaquin Bank.

The company had become indebted to the bank in the sum of $15,000, for which obligation it had on January 9, 1920, executed its promissory note.

J. M. Henderson, Jr., one of the respondents here, was the president and manager of the bank and in control of all its business transactions. He was also the president of the Sacramento-San Joaquin Bank, in fact, one of its principal stockholders (Tr. Rec. p. 93).

In September of 1920, Geo. W. Cowen, president and manager of the bankrupt corporation, finding the corporation financially embarrassed, consulted with said J. M. Henderson, Jr., and as a result of

this and subsequent conferences an agreement of trusteeship was entered into on the 15th day of September, 1920, between the Geo. W. Cowen Co., Inc., a corporation, said bankrupt, and said J. M. Henderson, Jr., and T. J. Scannell, respondents here, whereby said J. M. Henderson, Jr., and T. J. Scannell were appointed assignees for the benefit of creditors. This agreement is set out in *haec verba* as Exhibit 19 (Tr. Rec. pp. 123-129, inclusive).

The assignees assumed immediate control, and the bankrupt corporation ceased from that moment to function as a business concern. Several conferences of all parties in interest were held at the office of the company, at which both of the assignees and the principal officers of the corporation were present.

J. M. Henderson, Jr., one of the assignees, and one of the respondents here, was likewise president of and in authority of the creditor bank. The minutes of the meeting held September 24, 1920, nine days after the execution of the assignment, show that all checks were to be signed by the trustees (Tr. Rec. pp. 155-156).

The records of the bank show that on September 24, 1920, the account of the Geo. W. Cowen Co., Inc., was closed and the signature of Geo. W. Cowen as president canceled (Tr. Rec. pp. 85, 94, 95, 112, 158); that on the same day a new account was opened in the same bank under the name of J. M. Henderson, Jr., and T. J. Scannell, Trustees Geo.

W. Cowen Co., Inc., and that all funds derived from the conduct of the business by said assignees were subsequently deposited to this account and paid out only on checks signed by the assignee.

After the bankruptcy proceedings were instituted, the bank records showing the closing of the bankrupt company's account and the opening of the new assignees' account were destroyed, under the express direction of Mr. J. M. Henderson, Jr., co-assignee and the president of the bank.

An attempt was made later to restore the record of the account of the Geo. W. Cowen Co., said bankrupt, by rewriting the ledger sheets as a continuation of the old account of the Geo. W. Cowen Co. and substituting these sheets for those bearing the names of the assignees (Tr. Rec. pp. 112, 113, 114, 118).

It is also in evidence that the officials of the bank, again acting under the direct instructions of J. M. Henderson, Jr., immediately after the change in the account, and from time to time thereafter within a short period applied the funds belonging to the credit of the account of said assignees against the $15,000 obligation owed the bank by the Geo. W. Cowen Co., Inc., and, in this way applied the sum of $12,883.81 (Tr. Rec. pp. 115-117; 119-123; see also answer Tr. Rec. p. 40).

A petition in involuntary bankruptcy was filed against the Geo. W. Cowen Co., Inc., on October 12, 1920 (Tr. Rec. p. 22), and notwithstanding the filing

of this petition the said assignees, J. M. Henderson, Jr., and T. J. Scannell continued to deposit the funds obtained from the operation of the business with the bank in question (Tr. Rec. pp. 119-123).

After due proceedings an order of adjudication was entered against the Geo. W. Cowen Co., Inc., and Mr. A. L. May was appointed and qualified as the trustee in bankruptcy herein. Shortly after his qualification a petition was filed by said trustee in bankruptcy with the referee asking for a summary order directing the said assignees to account for and turn over to the trustee in bankruptcy the funds in question.

An order to show cause was issued, and answer was made by Messrs. Henderson and Scannell denying that the assignment in trust had ever become effective, or that they or either of them had acted as trustee; that Scannell had acted as manager of the bankrupt's business, had deposited moneys received from the sales with the Fort Sutter National Bank of Sacramento, and had checked against the deposit to pay current expenses, and that the amount deposited exceeded the withdrawals by $12,883.81. The further defense was set up that the said Fort Sutter National Bank and its successor in interest, the Sacramento-San Joaquin Bank, then held said sum and claimed said moneys as a partial set off to a note of the bankrupt for $15,000, and that the claim of the bank was made in good faith. The answer further alleged that Henderson and

Scannell were without the legal right or power to demand or retake the moneys, and that the referee, under the circumstances, had no jurisdiction to compel them to pay the money to the trustee in bankruptcy (Tr. Rec. pp. 34-41, inclusive).

A hearing was had upon the issues raised, and the referee held that the claim of said J. M. Henderson, Jr., and T. J. Scannell that the foregoing funds were no longer under their control *was not made in good faith,* but that there was then in the hands of J. M. Henderson, Jr., and T. J. Scannell the sum of $12,883.81 belonging to the bankrupt's estate (Tr. Rec. p. 61), and directed said Henderson and Scannell to pay over to the trustee in bankruptcy herein the aforesaid sum of $12,883.81 within fifteen days from the date of said order (Tr. Rec. pp. 43-45).

Within the time required by the statute a petition for review of the order of the referee was filed (Tr. Rec. pp. 45-47, inclusive), and after consideration by the District Court an order was entered by the latter affirming the order of the referee directing payment to the trustee of the aforesaid sum of $12,883.81 (Tr. Rec. p. 7).

The Judge of the District Court in sustaining the referee affirms the order in the following language:

> "There is no question here of directing the bank to pay over funds claimed by it. The order is that J. M. Henderson, Jr., and T. J. Scannell pay over to A. L. May, Trustee in Bankruptcy, the sum of $12,883.81. This money

> they received as trustees for the creditors of the bankrupt, and as such trustees they are bound to account for it. The order is therefore affirmed."

Thereafter, J. M. Henderson, Jr., and T. J. Scannell, under Section 24-b of the Bankruptcy Act, filed a petition in the United States Circuit Court of Appeals for the Ninth Circuit for review, praying that the orders and decree of the referee and District Court be reviewed and revised in the matter of law, etc. (Tr. Rec. pp. 1-6).

After hearing said petition for revision, said Circuit Court of Appeals on the 7th day of May, 1923, entered a decree (Tr. Rec. pp. 227-228) reversing the order of the District Court, and on the same day filed a typewritten opinion in the case (Tr. Rec. pp. 220-227).

On the 6th day of June, 1923, petitioner here filed with said Circuit Court of Appeals his petition for a rehearing, and on the 18th day of June, 1923, an order was entered by said Circuit Court of Appeals denying the said petition for rehearing (Tr. Rec. p. 229).

On the 22nd day of June, 1923, an order was made by said Circuit Court of Appeals staying the issuance of the mandate (Tr. Rec. p. 230).

The opinion of the Circuit Court of Appeals states that

> "When a debtor who has made a general assignment for the benefit of his creditors is ad-

> judged a bankrupt, within four months thereafter the court of bankruptcy has jurisdiction in a summary proceeding to make an order requiring the assignee to submit his accounts and turn over to the trustee in bankruptcy all money and property in his hands."

But upon the authority of the decision of the United States Circuit Court of Appeals for the Third Circuit, in the case of *American Trust Co. of Pittsburgh v. Wallis*, 126 Fed. 464 (11 Am. B. R. 360), and upon the authority of *Sinsheimer v. Simonson*, 107 Fed. 898 (5 Am. B. R. 537), the said Circuit Court of Appeals has held that the District Court has no jurisdiction by summary process to compel the respondents to deliver the funds which they received as assignees, to the trustee in bankruptcy, irrespective and in spite of the fraud perpetrated by the respondents in manipulating these funds in such manner as apparently to put them out of their possession or control.

With all due respect, your petitioner maintains that the decisions above referred to are not applicable to the case at bar.

The case of *American Trust Co. of Pittsburgh v. Wallis*, supra (from which excerpts are embodied and quoted *in extenso* in the opinion), refers to a bankrupt who, irrespective of the filing of the involuntary petition in bankruptcy against him, had collected various sums of money from various debtors, and in turn disbursed such funds to various credi-

tors and no portion thereof remained in his possession.

The case of *Sinsheimer v. Simonson* (supra) denies relief by summary order to an assignee, because the assignee had held certain amounts coming into his possession as assignee to reimburse himself for his services as such assignee and made adverse claim to those funds in good faith.

Neither of the respondents here asserted any adverse claim or lien upon any of the funds that they had collected before the intervention of the bankruptcy proceedings. Their entire contention rests upon the anomalous situation created by the dual position taken by Mr. Henderson, viz: That of assignee for the benefit of creditors and president of the creditor bank, in which dual capacity he was able as assignee to deposit the funds received by him in the conduct of the bankrupt's business to the credit of himself and his co-assignee in an account opened for that purpose in the bank in which he was president, and subsequently in his capacity as president of said bank to direct the bank to apply the funds in the trustee's account against the indebtedness of the bankrupt to the bank. Again using his position as president, and after the adjudication in bankruptcy of the Cowen Co., Henderson ordered the records of the bank concerning the account of the assignees to be destroyed, and the records rewritten to show that the funds received

by the assignees were placed to the credit of the bankrupt corporation.

In effect, the Circuit Court of Appeals holds, as above stated, that while an assignee may be required by a court of bankruptcy in summary proceedings to submit his accounts and turn over the money and property in his hands, the bankruptcy court, nevertheless, in view and in spite of the foregoing facts, has not the jurisdiction by summary procedure to inquire into the nature of the claim asserted to ascertain if it be adverse or not. It has further held that though the assignees fail in themselves to assert any adverse claim, irrespective of the proof of manipulation of the bank's accounts by one of the assignees, the referee is, nevertheless, without jurisdiction to compel him to surrender the property to the trustee.

It is to review the rulings of the Circuit Court of Appeals on these questions that this petition for a writ of certiorari is applied for. The questions are of paramount importance because unless that decision of the Circuit Court of Appeals is reversed or materially modified, the power of the bankruptcy court under Section 2 (6), (7) and (13) of the Act to bring in and substitute additional persons or parties in proceedings in bankruptcy, when necessary for the complete determination of a matter in controversy; to cause the estate of bankrupts to be collected, reduced to money and distributed; to determine controversies in relation thereto and to

enforce obedience by bankrupts and other persons, will be almost, if not entirely, rendered nugatory.

Your petitioner, maintains that under the authority of

Mueller v. Nugent, 184 U. S. 1; 7 Am. B. R. 224;

the referee in bankruptcy has power by summary proceedings to compel the surrender of the property to the trustee in bankruptcy duly appointed, and that a mere refusal so to deliver, when based upon a wrongful and fraudulent act, does not oblige the trustee to resort to a plenary suit to recover the property, nor does such refusal to surrender constitute an adverse holding in fact or an adverse claim at the time the petition in bankruptcy was filed. Therefore, your petitioner maintains that the Circuit Court of Appeals erred when it held, as it did, in effect, that the funds here in question cannot be recovered for the estate except by an independent, plenary, dilatory and expensive suit in some other court.

The same principle is enunciated in the case of

Schweer v. Brown, 130 Fed. 328, affd. 195 U. S. 171, 12 Am. B. R. 673,

subsequently affirmed by this court, and in which decision we find the following language:

> "The adjudication in bankruptcy operated to transfer to the trustee the title to all of the property of the bankrupt which was subject to distribution among his creditors. His obligation and his duty to surrender to the trustee

property in his possession which belongs to the trustee, and not to him, cannot be converted into a debt, at his option, by his mere refusal to comply with the order of the court. *Mueller v. Nugent,* 184 U. S. 1, 7 Am. B. R. 224; *In re Purvine,* 2 Am. B. R. 787, 96 Fed. 192; *In re Rosser,* 4 Am. B. R. 153, 101 Fed. 562; *Ripon Knitting Works v. Schrieber* (D. C.), 4 Am. B. R. 299, 101 Fed. 810; Id. 104 Fed. 1006; *In re Schlesinger,* 4 Am. B. R. 361, 102 Fed. 117. These cases also furnish a conclusive answer to the claim of the bankrupt that his mere denial under oath of the possession of assets is conclusive, and that in such case the only remedy of the trustee and the creditors is by proceedings under the penal sections of the Bankrupt Act."

Your petitioner contends that the fact that these assignees, through their own wrongful acts, violated the terms of their trust, cannot operate to put them without the reach of the bankruptcy court's summary jurisdiction.

The findings of the referee, affirmed by the District Court, and indisputably established by the evidence as disclosed in the record, hold: That the assignees do not claim any of the funds here in question; that the assignees' contention that the money is out of their possession or control is not made in good faith.

The United States Circuit Court of Appeals for the Fifth Circuit has held in the case of

Stuart v. Reynolds (in re Reynolds), 204 Fed. 709,

that the findings of the referee cannot be disturbed after affirmance thereof by the District Court.

And in the case of

Epstein v. Steinfeld, 32 Am. B. R. 6, at 7, 210 Fed. 236,

the United States Circuit Court of Appeals for the Third Circuit likewise sustains this principle of law in the following language:

> "The findings of the referee were made by him after he had taken a large amount of conflicting testimony covering every phase of the alleged withholding of property by the bankrupt, and when he had the opportunity to and did see the witnesses who testified. His findings, as has been decided over and over again, ought not to be disturbed except where it is demonstrated that a plain mistake has been made."

Your petitioner, in view of the foregoing, contends that by reason of the decision in the case at bar and the decisions herein referred to, there is a contrariety of opinion and not a uniform administration of the bankruptcy act as to the important question, towit, the right of the bankruptcy court to summarily order in property which is an asset of the bankrupt's estate and which by reason of wrongful and fraudulent acts of the holder is claimed to be out of his possession or control.

Your petitioner annexes hereto his brief in support of this petition.

Wherefore, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court a

full and complete transcript of the record in all proceedings in said Circuit Court of Appeals in the case therein entitled "In the Matter of Geo. W. Cowen Co., Inc., a Corporation, Bankrupt, J. M. Henderson, Jr., and T. J. Scannell, Petitioners, vs. A. L. May, as Trustee in Bankruptcy of George W. Cowen Company, Incorporated, Respondent," on petition of J. M. Henderson, Jr. and T. J. Scannell for review, numbered 3843, to the end that said case may be reviewed and determined by this court as provided by law, and that the judgment of the said Circuit Court of Appeals in said case may be reversed by this Honorable Court.

And that petitioner may have such other and further relief as may be meet and proper.

And your petitioner will ever pray.

Dated, San Francisco, California,
July 18, 1923.

A. L. MAY,
as Trustee in Bankruptcy of
Geo. W. Cowen Co., Inc. (a
corporation), Bankrupt,
Petitioner.

HENRY G. W. DINKELSPIEL,
Attorney for Petitioner.

HENRY A. JACOBS,
G. B. BLANCKENBURG,
MARTIN J. DINKELSPIEL,
Of Counsel.

State of California,
City and County of San Francisco.—ss.

A. L. May, being duly sworn, says: That he is the trustee in bankruptcy of Geo. W. Cowen Co., Inc., a corporation, bankrupt, and the petitioner herein; that he has read the foregoing petition and the facts therein stated are true as he believes.

A. L. MAY.

Subscribed and sworn to before me this 18th day of July, 1923.

(Seal) H. B. DENSON,
Notary Public in and for the City and County of San Francisco, State of California.

(My commission expires December 20, 1926.)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1923

No.

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

A. L. MAY, as Trustee in Bankruptcy of Geo. W. Cowen Co., Inc. (a corporation), Bankrupt,

Petitioner,

vs.

J. M. HENDERSON, JR. and T. J. SCANNELL,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

This is an application by A. L. May, as trustee in bankruptcy of Geo. W. Cowen Co., Inc., a corporation, bankrupt, for a writ of certiorari to the

United States Circuit Court of Appeals for the Ninth Circuit to require the said Court of Appeals to certify to this court for its revision and determination the petition for review taken in said bankruptcy proceeding by J. M. Henderson, Jr. and T. J. Scannell, the respondents here, as against the petitioner, trustee, of the summary order made by the referee in bankruptcy in said case, subsequently affirmed by the District Court, directing said respondents, J. M. Henderson, Jr. and T. J. Scannell to turn over to the trustee the sum of $12,883.81.

Statement of the Case.

The Geo. W. Cowen Co., Inc., bankrupt herein, conducted a ladies' ready to wear department store at Sacramento, California. It had a bank account with the Fort Sutter National Bank, since taken over, or succeeded by the Sacramento-San Joaquin Bank.

The company had become indebted to the bank in the sum of $15,000, for which obligation it had on January 9, 1920, executed its promissory note.

J. M. Henderson, Jr., was the president and manager of the bank and in control of all its business transactions. He was also the president of the Sacramento-San Joaquin Bank, in fact, one of the principal stockholders (Tr. Rec. p. 93).

In September of 1920, Geo. W. Cowen, the president and manager of the bankrupt corporation,

finding the corporation financially embarrassed, consulted with Mr. Henderson. As a result of this and subsequent conferences an agreement of trusteeship was entered into on the 15th day of September, 1920, between the Geo. W. Cowen Co., Inc., a corporation, said bankrupt, and said J. M. Henderson, Jr. and T. J. Scannell, whereby said Henderson and Scannell were appointed assignees for the benefit of creditors.

The agreement was properly executed; the assignees assumed immediate control, and the bankrupt corporation ceased from that moment to function as a business concern. Several meetings of all parties in interest were held at the office of the company immediately after the execution of this agreement. At these meetings both of the assignees as well as the principal officers of the corporation were present. It must be borne in mind throughout that J. M. Henderson, Jr., one of the assignees, was likewise president of and in authority of the creditor bank. At one of these meetings held September 24, 1920, nine days after the execution of the assignment, the minutes show that all checks were to be signed by the trustees (Tr. Rec. pp. 155-156).

The records of the bank show that on the same day, September 24, 1920, the account of the Geo. W. Cowen Co., Inc. was closed and the signature of Geo. W. Cowen as president canceled (Tr. Rec. pp. 85, 94, 95, 112, 158); that on the same day a new

account was opened in the bank under the name of J. Henderson, Jr., and T. J. Scannell, trustees Geo. W. Cowen Co., Inc., and that all funds derived from the conduct of the business by said assignees were subsequently deposited to this account and paid out only on checks signed by the assignee.

Demand was made upon the bank by counsel for the trustee in bankruptcy at the hearing conducted, for the signature card showing the authority of the assignees to sign checks, but which signature card the bank failed to produce.

After the bankruptcy proceedings were instituted, the bank records showing the closing of the bankrupt company's account and the opening of the new assignees' account were destroyed, as the evidence shows, under the express direction of Mr. J. M. Henderson, Jr., co-assignee and the president of the bank.

An attempt was made later to restore the record of the account of the Geo. W. Cowen Co., said bankrupt, by rewriting the ledger sheets as a continuation of the old account of the Geo. W. Cowen Co. and substituting these sheets for those bearing the names of the assignees (Tr. Rec. pp. 112, 113, 114, 118).

It is also in evidence that the officials of the bank, again acting under the direct instructions of J. M. Henderson, Jr., immediately after the change in the account, and from time to time thereafter within a short period applied the surplus property

belonging to the credit of the account of said assignees against the $15,000 obligation owed the bank by the Geo. W. Cowen Co., Inc., and, in this way applied the sum of $12,883.81 (Tr. Rec. pp. 115-117; 119-123; see also answer Tr. Rec. p. 40).

The petition in involuntary bankruptcy was filed against the Geo. W. Cowen Co., Inc., on October 12, 1920 (Tr. Rec. p. 22). Notwithstanding the filing of this petition the said assignees, J. M. Henderson, Jr., and T. J. Scannell continued to deposit the funds obtained from the operation of the business with the bank in question (Tr. Rec. pp. 119-123).

After due proceedings an order of adjudication was entered against the Geo. W. Cowen Co., Inc., and A. L. May was appointed and qualified as the trustee in bankruptcy. Shortly after his qualification a petition was filed by said trustee in bankruptcy with the referee asking for a summary order directing the said assignees to account for and turn over to the trustee in bankruptcy the funds in question.

An order to show cause was issued, and answer was made by Messrs. Henderson and Scannell denying that the assignment in trust had ever become effective, or that they or either of them had acted as trustee; that Scannell had acted as manager of the bankrupt's business, had deposited moneys received from the sales with the Fort Sutter National Bank of Sacramento, and had checked against the deposit to pay current expenses, and that the

amount deposited exceeded the withdrawals by $12,883.81. The further defense was set up that the said Fort Sutter National Bank and its successor in interest, the Sacramento-San Joaquin Bank, then held said sum and claimed said moneys as a partial setoff to a note of the bankrupt for $15,000, and that the claim of the bank was made in good faith. The answer further alleged that Henderson and Scannell were without the legal right or power to demand or retake the moneys, and that the referee, under the circumstances, had no jurisdiction to compel them to pay the money to the trustee in bankruptcy (Tr. pp. 34-41, inclusive).

A hearing was had upon the issues raised, and the referee held that the claim of said J. M. Henderson, Jr., and T. J. Scannell that the foregoing funds were no longer under their control *was not made in good faith*, but that there was then in the hands of J. M. Henderson, Jr., and T. J. Scannell the sum of $12,883.81 belonging to the bankrupt's estate (Tr. p. 61), and directed said Henderson and Scannell to pay over to the trustee in bankruptcy herein the aforesaid sum of $12,883.81 within fifteen days from the date of said order (Tr. pp. 43-45).

Within the time required by the statute a petition for review of the order of the referee was filed (Tr. pp. 45-47, inclusive), and after consideration by the District Court an order was entered by the latter affirming the order of the referee directing

payment to the trustee herein of the aforesaid sum of $12,883.81 (Tr. Rec. p. 7).

Thereupon, the respondents took an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and at the same time filed a petition for revision of the order of said District Court, the matter being presented to said Court of Appeals, under stipulation, in one transcript (Tr. Rec. pp. 11-12). Subsequently the said United States Circuit Court of Appeals filed its opinion in pursuance of which a judgment was entered dismissing the said appeal and reversing the order of the said District Court on the said petition for revision (Tr. Rec. pp. 227-228).

A petition for rehearing was then filed by the trustee and denied by the said Circuit Court of Appeals (Tr. Rec. p. 229).

Questions Involved.

The questions involved in this case, to which we expect to address our argument, are as follows:

(A) Can assignees for the benefit of creditors (under a written assignment within four months prior to bankruptcy) evade the consequences of summary proceedings and deprive the bankruptcy court of jurisdiction to summarily order them to turn over funds coming into their possession to the trustee in bankruptcy, when by their own wrongful act they attempt to divest themselves of the control of such funds?

(B) Is an assignee for the benefit of creditors answerable in summary proceedings when, in his dual capacity as president of a creditor bank of the bankrupt, he causes the records of the bank to be changed, to indicate that the funds, which he has deposited with such bank as assignee, shall be shown as credited to another account, for the purpose of enabling the misappropriation of such funds?

The petitioner maintains that (A) should be answered in the negative, and (B) in the affirmative.

Argument.

ASSIGNEES FOR THE BENEFIT OF CREDITORS UNDER ASSIGNMENT EXECUTED WITHIN FOUR MONTHS PRIOR TO BANKRUPTCY ARE SUBJECT TO SUMMARY PROCEEDINGS TO ACCOUNT FOR AND DELIVER PROPERTY IN THEIR HANDS OR UNDER THEIR CONTROL, AND CANNOT DEPRIVE THE BANKRUPTCY COURT OF SUMMARY JURISDICTION WHEN BY THEIR OWN WRONGFUL ACTS THEY ATTEMPT TO DIVEST THEMSELVES OF THE POSSESSION OR CONTROL OF SUCH PROPERTY.

Assignees for the benefit of creditors are answerable to the summary jurisdiction of the bankruptcy court respecting funds in their hands belonging to the bankrupt estate. There are numerous decisions upon this point and it may be regarded as settled.

In re Rathman (Rathman v. Booth), 25 Am. B. R. 246, at 258, 183 Fed. 913.

"Assignees for the benefit of creditors and receivers for the benefit of creditors in insol-

vency or in winding-up suits appointed after four months prior to the filing of a petition in bankruptcy are not adverse claimants, but are only representatives of the bankrupt and his unsecured creditors within the meaning of section 23 of the Bankruptcy Law, because they have and claim no lien upon, right to, or interest in the property in themselves, for which they have given a valuable consideration. From them and from others holding the property of the bankrupt for him, including officers of other courts, who replevin or attach it without claim of lien upon, or right to the property in themselves, the bankruptcy court may by summary proceeding take the actual possession of the property and then when it has thus acquired the actual possession may by summary proceedings determine the validity of claims or liens upon and titles to it. *Mueller v. Nugent,* 184 U. S. 1, 14, 15, 7 Am. B. R. 224; *In re Watts and Sachs,* 190 U. S. 1, 27, 10 Am. B. R. 113; *White v. Schloerb,* 178 U. S. 542, 545, 546, 4 Am. B. R. 178."

A TRUSTEE HAVING ONCE ACCEPTED HIS TRUST CANNOT ATTEMPT TO BREAK DOWN THE BARRIERS AND RELIEVE HIMSELF WITHOUT THE CONSENT OF THE CESTUI QUE TRUST.

"A trustee must fulfill the purpose of the trust, as declared at its creation, and must follow all the directions of the trustor given at that time, except as modified by the consent of all parties interested, in the same manner, and to the same extent, as an employee."

Sec. 2258 Civil Code of California.

See also

Bemmerly v. Woodward, 124 Cal. 568, at 572.

"As the administration was left open because of the trust, Woodward was, of course, responsible as trustee, and should have kept the money invested for his beneficiaries."

The respondents here have contended that it was the understanding and intention that the trust created by the assignment agreement should not go into effect until it was consented to by all of the creditors. No such declaration is found in the instrument, and in fact the creditor bank itself signed the same, setting forth the full amount of its claim of $15,000.

There never was any rescission.

"The mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission."

Sec. 2251 Civil Code of California.

The trusteeship then, having gone into effect, could only be dissolved either by the fulfillment of its object or by such object becoming impossible or unlawful.

"A trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful."

Sec. 2279 Civil Code of California.

Thus it will be noted that J. M. Henderson, Jr., having been directed and empowered by all of the parties in interest to direct and control the funds

of the Geo. W. Cowen Co., and having clothed himself with this authority, and having actually come into possession of all of these funds, cannot now claim that the trust did not become effective, thereby releasing himself of responsibility, but, on the contrary, he must personally account for all moneys which since the 15th day of September, 1920, have come into his possession.

"A trustee who uses or disposes of the trust property, contrary to section two thousand two hundred and twenty-nine, may, at the option of the beneficiary, be required to account for all profits so made, or to pay the value of its use, and, if he has disposed thereof, to replace it, with its fruits, or to account for its proceeds, with interest."

Sec. 2237 Civil Code of California.

"A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner."

Sec. 2229 Civil Code of California.

See

Bermingham v. Wilcox, 120 Cal. 467, at 472.

"It was not necessary that there should have been an express agreement between them for a division of the management of the estate in order that one should be liable for the acts of the other. 'Where an executor by his negligence suffers his coexecutor to receive and waste the estate, when he has the means of preventing it by proper care, he is liable to the beneficiaries under the will for the estate thus wasted.' (Adair v. Brimmer, 74 N. Y. 539.)"

See also

Burns v. Clark, 133 Cal. 634;
Calmon v. Sarraille, 142 Cal. 638.

The respondents assume that a mere denial on their part that the funds in question are under their control is sufficient to divest the referee of the right to inquire into the facts respecting such contention, thus relegating the trustee to the filing of a plenary suit. This we do not understand to be the law, otherwise it would nullify the force and effect of summary proceedings. It would deprive the bankruptcy court, through its referee, of exercising control of the funds properly belonging to the bankrupt estate, and might through long and tedious litigation prevent the recovery of such property. It is the function of the referee in bankruptcy in summary proceedings to inquire into the merits of a so-called adverse claim to the extent that if it shall be determined that funds or property are either in the possession or under the control of a respondent, and that adverse claim thereto is not made in good faith, or is false or fraudulent, or merely colorable, to find the same without valid foundation and the trustee entitled to the relief demanded.

The cases supporting this principle are numerous.

The case of

Schweer v. Brown, 12 Am. B. R. 179, 130 Fed. 328, affd. 195 U. S. 171, 12 Am. B. R. 673,

subsequently affirmed by the Supreme Court, says:

"The adjudication in bankruptcy operated to transfer to the trustee the title to all of the property of the bankrupt which was subject to distribution among his creditors. His obligation and his duty to surrender to the trustee property in his possession which belongs to the trustee, and not to him, cannot be converted into a debt, at his option, by his mere refusal to comply with the order of the court. *Mueller v. Nugent,* 184 U. S. 1, 7 Am. B. R. 224; *In re Purvine,* 2 Am. B. R. 787, 96 Fed. 192; *In re Rosser,* 4 Am. B. R. 153, 101 Fed. 562; *Ripon Knitting Works v. Schrieber,* (D. C.), 4 Am. B. R. 299, 101 Fed. 810; Id. 104 Fed. 1006; *In re Schlesinger,* 4 Am. B. R. 361, 102 Fed. 117. These cases also furnish a conclusive answer to the claim of the bankrupt that his mere denial under oath of the possession of assets is conclusive, and that in such case the only remedy of the trustee and the creditors is by proceedings under the penal sections of the Bankrupt Act."

In the Matter of Stern, 32 Am. B. R. 281, at p. 283, 215 Fed. 979,

the court says:

"The mere denial of the bankrupt is by no means controlling."

In

Ellis Bros. Printing Co., 19 Am. B. R. 473, 156 Fed. 430,

it is said:

"Upon the authorities cited in the report of the master, the bankruptcy court has power to inquire into the facts for the purpose of determining whether any basis exists for the adverse claim of title to the property asserted by the respondent. The mere assertion of an

adverse claim of title, even with an intention to protect it by the usual process of law, will not preclude the bankruptcy court from exercising its power to proceed summarily. *In re Andre,* 13 Am. B. R. 132, 135 Fed. 736, 68 C. C. A. 374. It is only when the evidence indicates that the asserted claim is not false or fraudulent that the bankruptcy court is deprived of jurisdiction. If it should appear from the proofs that the respondent, Strong, refuses to surrender the money collected by him to the trustee simply on the ground that the title to the same is conclusively evidenced by his possession of it, or if the claim is unreal or colorable, then it is the duty of this court to direct its payment to the trustee. This principle of law is so clearly and definitely stated by the Supreme Court in *Mueller v. Nugent,* 184 U. S. 1, 7 Am. B. R. 224, 22 Sup. Ct. 269, 46 L. Ed. 405, that no other citations are thought necessary.

In the prior cases decided by this court, in passing upon the right to exercise summary jurisdiction, it was not intended to be understood as holding that, irrespective of whether the elicited facts were sufficient in law, the mere assertion of an adverse claim of title or ownership deprived the court of summary power. If the proofs show that in fact there is no legal basis for the asserted adverse claim, the summary power of the court is not defeated."

In *Matter of Eddy,* 48 Am. B. R. 607, at page 609:

"The corporation has the right to assert that it is in rightful possession and an adverse claimant thereto. Such a determination cannot be made in view of the categorical denial by the bankrupt that the transfer was in bad faith.

See *In re Briskman* (D. C., N. Y.), 13 Am. B. R. 57, 132 Fed. 201; *In re New York Car Wheel Works* (D. C., N. Y.), 14 Am. B. R. 595, 132 Fed. 203. There must be inquiry into the merits of such a controversy. It cannot here be determined on opposing affidavits. If in the judgment of the court the asserted adverse claim is colorable and in bad faith, a surrender of possession may be required summarily."

Probably the mose important case settling conclusively the control of the bankruptcy court over all assets of a bankrupt from the date of the filing of the petition in bankruptcy is the case of

Mueller v. Nugent, 7 Am. B. R. 224, 184 U. S. 1.

Honorable Chief Justice Fuller, in delivering the opinion, says:

"Does a mere refusal by the bankrupt or his agent so to deliver up oblige the trustee to resort to a plenary suit in the Circuit Court or a Sate Court, as the case may be?

If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected, and to determine controversies relating thereto, would be seriously impaired, and, in many respects, rendered practically inefficient.

The bankruptcy court would be helpless indeed if the bare refusal to run over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the Bankrupt Law.

It is as true of the present law as it was of that of 1867, that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction. Bank v. Sherman, 101 U. S. 407; and on adjudication, title to the bankrupt's property became vested in the trustee, secs. 70, 21e, with actual or constructive possession, and placed in the custody of the bankruptcy court."

AN ASSIGNEE OCCUPYING A DUAL POSITION OF PRESIDENT OF A CREDITOR BANK IS ANSWERABLE IN SUMMARY PROCEEDINGS WHEN IN HIS DUAL CAPACITY HE CAUSES RECORDS OF HIS BANK TO BE CHANGED TO INDICATE THAT FUNDS DEPOSITED AS ASSIGNEE SHALL BE SHOWN AS CREDITED TO ANOTHER ACCOUNT TO CONSUMMATE THEIR MISAPPROPRIATION.

"A trustee may not use the influence which his position gives him to obtain any advantage from his beneficiary."

Sec. 2231 Civil Code of California.

Such transactions are regarded as against public policy.

Wickersham v. Crittenden, 93 Cal. 17, 28-9.

"It is one of the peculiar functions of a court of equity to protect a *cestui que* trust against any violation by his trustee of his obligation, and to prevent any impairment of the trust fund, and in case of diversion or misappropriation of such fund by the trustee, to direct a restitution thereof, and to enforce such direction by some process appropriate to the exercise of its jurisdiction."

In the case of

In re Thompson, 11 Am. B. Rep. 719, 128 Fed. 575,

decided by the United States Circuit Court of Appeals of the Second Circuit, we find the following language:

> "It is manifest that the court had jurisdiction to compel the assignee under the void state assignment to render an account. *Bryan v. Bernheimer,* 181 U. S. 188, 5 Am. B. R. 623, 45 L. Ed. 814. This proposition is not disputed. The petitioner, Murray, recognizing the authority of the court, appeared voluntarily before the referee, presented his account and gave testimony regarding it. Having once acquired jurisdiction of the proceeding, the court did not lose it because the investigation took a wider range than the assignee expected or intended. His present contention, carried to its logical conclusion, is that the court acquired jurisdiction of those items which he chose to admit, but not to those which he chose to dispute, and that this jurisdiction was lost the moment he asserted a claim of title in his individual capacity. If this contention were sustained an assignee for the benefit of creditors could, by the mere assertion of a colorable claim, paralyze the arm of the court of bankruptcy and defeat the intent and purpose of the law."

THE FINDINGS OF THE REFEREE ARE ENTITLED TO CONSIDERATION.

It would appear that the findings of the referee pon the evidence adduced at the hearings held in is matter are not given the consideration due them y the Circuit Court of Appeals for the Ninth ircuit in arriving at its decision in this case. It

is respectfully submitted that the findings of the referee should not be disturbed by the Court of Appeals. This principle of law has been sustained by numerous decisions, and we content ourselves with citations from two of the leading cases. It is clearly stated by Mr. Justice Meek of the U. S. Circuit Court of Appeals, 5th Circuit, in the case of

Stuart v. Reynolds (In re Reynolds), 29 Am. B. R. 412, at p. 415, 204 Fed. 709:

> "This proceeding is brought here under the provisions of Section 24-b of the Bankruptcy Act. Therefore, we are not authorized to determine questions of fact upon which the order of the lower court is based, but may only superintend, and, if need be, revise its action in the matter of law. This is now the settled interpretation given Sec. 24-b. *Matter of Loving*, 224 U. S. 183, 27 Am. B. R. 852" and other cases.

To the same point is

Epstein v. Steinfeld, 32 Am. B. R. 6, at 7, 210 Fed. 236.

The opinion of the U. S. Circuit Court of Appeals, Third Circuit, in that case states:

> "The findings of the referee were made by him after he had taken a large amount of conflicting testimony covering every phase of the alleged withholding of property by the bankrupt, and when he had the opportunity to and did see the witness who testified. His findings, as has been decided over and over again, ought not to be disturbed except where it is demonstrated that a plain mistake has been

made. This rule is so forcibly stated in Ohio Valley Bank Co. v. Mack (C. C. A. 6th Cir.) 20 Am. B. R. 40, 163 Fed. 155, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184, by Judge Lurton, that we quote it at some length:

'No arbitrary rule can be laid down for determining the weight which should be attached to a finding of fact by a bankrupt referee. His position and duties are analogous, however, to those of a special master directed to take evidence and report his conclusions, and the rule applicable to a review of a referee's findings of fact must be substantially that applicable to a master's report. *Tilghman v. Proctor,* 125 U. S. 137, 8 Sup. Ct. 894, 31 L. Ed. 664; *Davis v. Schwartz,* 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; *Emil Kiewert & Co. v. Juneau,* 78 Fed. 708, 24 C. C. A. 294; *Tug River Co. v. Brigel,* 86 Fed. 818, 30 C. C. A. 415. Much in both cases must depend upon the character of the finding. If it be a deduction from established fact, the finding would not carry any great weight, for the judge, having the same facts, may as well draw inferences or deduce a conclusion as the referee. But if the finding is based upon conflicting evidence involving questions of credibility, and the referee has heard the witnesses, much greater weight naturally attaches to his conclusion, and the weight of authority is that the district judge, while scrutinizing with care his conclusions upon review, should not disturb his findings unless there is most cogent evidence of a mistake and miscarriage of justice. *Loveland on Bankruptcy,* section 32a; *In re Swift* (D. C., Mass), 9 Am. B. R. 237, 118 Fed. 348; *In re Rider,* (D. C., N. Y.), 3 Am. B. R. 192, 96 Fed. 811; *In re Waxelbaum* (D. C., Ga.), 4 Am. B. R. 120, 101 Fed. 228; *In re Stout* (D. C., Mo.), 6 Am. B. R. 505, 109 Fed. 794; *In re Miner* (D. C., Ore.), 9 Am.

> B. R. 100, 117 Fed. 953. In this case the conclusions of the referee necessarily involved the credibility of the witnesses who testified to the *bona fides* of the claim preferred by Charles Mack, Sr. The conclusion he reached in favor of the validity of his debt has also passed the scrutiny of the district judge. Under such circumstances, this court is not warranted in overturning the conclusions of two courts upon anything less than a demonstration of plain mistake'."

It must be remembered that the trustee in bankruptcy was able to prove his case by the testimony of adverse witnesses, and that it was not without some considerable effort that the facts were established. Furthermore, it should be remembered that the referee in bankruptcy who sat at the various hearings was in a position to judge not only as to the character of the testimony, but the general demeanor of the witnesses examined, and when he found that there was a fraudulent destruction of the records and concluded that the funds of the assignees were still under their control, the findings should not be disturbed.

The findings of the referee are amply supported, and we wish to call particular attention to the following contained in the referee's certificate (Tr. p. 54):

> "The account in the Fort Sutter National Bank from and after that date was under the control absolutely of J. M. Henderson, Jr., who at all times was intimately advised and informed of the various transactions relating to the account."

Again, the referee finds the following which likewise we submit is amply supported by the evidence introduced in this case:

> "Finally, it is claimed on behalf of respondents that the Fort Sutter National Bank is not a party to the proceeding now before the referee, and that the claim of the trustee, if any, is a matter of a plenary action against the Fort Sutter National Bank. I cannot agree with this contention. Summing up the testimony of all the witnesses it conclusively appears that J. M. Henderson, Jr., as president of the Fort Sutter National Bank, at all times had and still has personal control of these funds. It is unquestionably true that a bank is custodian of money, and as such must recognize the authorization or signature of the party in whose name the deposit is held by the bank. The bank cannot of its own accord change or transfer this account without the direct instructions of its depositor, and as J. M. Henderson, Jr., and T. J. Scannell were trustees under an express trust agreement entered into by them under their own signatures, which agreement was also consented to in writing by the bank, I must conclude that the bank had actual knowledge of all of the transactions, and having this knowledge could not, even though instructed by its president, transfer the account to others without the consent of the beneficiaries under the trust agreement. I find further that J. M. Henderson, Jr., was the only officer in charge of the bank who at any time exerted any control over this account.
>
> For the foregoing reasons the referee finds that the claim of J. M. Henderson, Jr., and T. J. Scannell that the funds are no longer under their control is not made in good faith, but that there is now in the hands of J. M.

> Henderson, Jr., and T. J. Scannell the sum of $12,883.81, which should be paid to A. L. May, said trustee in bankruptcy."

Henderson, as president of the bank, could not lawfully change this account, and certainly exceeded any authority that he had either in law or by implication to order an account carried by the bank in the name of certain assignees to be destroyed and the funds to the credit of that account placed back to the credit of the corporation which happened to owe the bank money, so that the bank could apply its lien rights against the same.

In view of these circumstances, and the record establishes these facts, it appears to the petitioner that a case of palpable fraud with a view to deprive the creditors of the bankrupt estate of property to which they should be entitled has been committed, and that the assignees are answerable to the court in summary proceedings to turn back the moneys that they have mishandled in this way.

While attempted applications of the funds to the credit of the assignees were made by the bank before the petition in bankruptcy against the Cowen Co. was filed, there was at that particular time no money to the credit of the bankrupt corporation. On the contrary, the money at that time was to the credit of the assignees alone, and it was not until after the bankruptcy proceedings had been instituted that, the ledger sheet of the assignees' account were destroyed and rewritten upon the old ledger

sheet account of the Geo. W. Cowen Co. These entries in the records of the bank and the destruction of the old records were null and void, and a palpable fraud upon the creditors of the bankrupt corporation. This being so, it must be considered that the changes in the bank records were never made at all, and that therefore the funds are still to the credit of the assignees and the assignees accountable for the same.

The opinion of the Court of Appeals is based in part upon the question of the physical ability of the assignees to comply with the summary order.

We concede the law as laid down by the Honorable Justice but respectfully submit that the physical ability of Henderson, in view of what we have said before, is beyond question. We cannot agree that in this case a summary order directed against Messrs. Henderson and Scannell would be of no avail, but to the contrary we believe that the president of a bank, the position and standing of which is known, we daresay, throughout the State, can very readily be forced by such a proceeding to restore what he has illegally taken. Henderson, as assignee having collected certain funds resulting from the conduct of the business of the Cowen Co. and deposited them in a bank of which he himself was the president, to the credit of an account of himself and his co-assignee, can hardly be said no longer to have this money in his possession, when, as a matter of fact, the money is still in this bank, and

the bookkeeping records would show it but for the fact that employees of the bank, acting under his express directions alone, have made certain entries changing the accounts, and these changes being null and void, the conclusion follows that the account stands in the same position as it did before the bankruptcy proceedings were instituted, viz., to the credit of Henderson and Scannell as assignees.

Conclusion.

In conclusion, it is respectfully submitted that the judgment of the court below should be reversed and the order of the District Court affirmed.

Dated, San Francisco, California,
July 18, 1923.

Respectfully submitted,
HENRY G. W. DINKELSPIEL,
Attorney for Petitioner.

HENRY A. JACOBS,
G. B. BLANCKENBURG,
MARTIN J. DINKELSPIEL,
Of Counsel.

ADMISSION OF SERVICE.

Due service and receipt of a copy of the within notice of motion, motion, petition for a writ of certiorari, and brief in support thereof, is hereby admitted this.....day of July, 1923.

ARCHIBALD M. JOHNSON,
A. A. DELIGNE,
Attorneys for Respondents.

WM. R. STANSBU
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1924

No. 126

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

A. L. MAY, as Trustee in Bankruptcy of GEO. W. COWEN CO., INC. (a corporation), Bankrupt,

Petitioner,

vs.

J. M. HENDERSON, JR., and T. J. SCANNELL,

Respondents.

BRIEF FOR PETITIONER.

HENRY A. JACOBS,
HENRY G. W. DINKELSPIEL,
Attorneys for Petitioner.

G. B. BLANCKENBURG,
MARTIN J. DINKELSPIEL,
Of Counsel.

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A. L. MAY, as Trustee in Bankruptcy of GEO. W. COWEN CO., INC. (a corporation), Bankrupt,

Petitioner,

vs.

J. M. HENDERSON, JR., and T. J. SCANNELL,

Respondents.

BRIEF FOR PETITIONER.

The application of A. L. May, trustee in bankruptcy, for a writ of certiorari having been granted, petitioner herein now presents to this court for consideration the points and authorities upon which he relies.

The following is a brief statement of the facts which we submit supports the contention of the trustee in bankruptcy that a summary order is proper and should be enforced.

Statement of the Case.

The Geo. W. Cowen Co., Inc., bankrupt herein, conducted a ladies' ready to wear department store at Sacramento, California. It had a bank account with the Fort Sutter National Bank, since taken over, or succeeded by the Sacramento-San Joaquin Bank.

The company had become indebted to the bank in the sum of $15,000, for which obligation it had on January 9, 1920, executed its promissory note.

J. M. Henderson, Jr., was the president and manager of the bank and in control of all its business transactions. He was also the president of the Sacramento-San Joaquin Bank, in fact, one of the principal stockholders. (Tr. Rec. p. 93.)

In September of 1920, Geo. W. Cowen, the president and manager of the bankrupt corporation, finding the corporation financially embarrassed, consulted with Mr. Henderson. As a result of this and subsequent conferences an agreement of trusteeship was entered into on the 15th day of September, 1920, between the Geo. W. Cowen Co., Inc., a corporation, said bankrupt, and said J. M. Henderson,

Jr., and T. J. Scannell, whereby said Henderson and Scannell were appointed assignees for the benefit of creditors.

The agreement was properly executed; the assignees assumed immediate control, and the bankrupt corporation ceased from that moment to function as a business concern. Several meetings of all parties in interest were held at the office of the company immediately after the execution of this agreement. At these meetings both of the assignees —as well as the principal officers of the corporation— were present. (It must be borne in mind throughout that J. M. Henderson, Jr., one of the assignees, was likewise president of and in authority of the creditor bank.)

A record was kept of the minutes of these meetings, which records show that at the meeting held September 24, 1920, nine days after the execution of the assignment to J. M. Henderson, Jr., and T. J. Scannell, a resolution was regularly adopted providing that all checks should be signed only by J. M. Henderson, Jr., and T. J. Scannell, Trustees. (Tr. Rec. pp. 155-156.)

That this was actually done and the bank instructed to honor checks only upon these signatures is conclusively shown by the records of the Fort Sutter National Bank and its successor Sacramento-San Joaquin Bank. On September 24, 1920, the account of the Geo. W. Cowen Co., Inc., was closed at the bank. (Tr. Rec. pp. 85, 94, 95,

112, 158.) *On the same day a new account in the name of J. M. Henderson, Jr., and T. J. Scannell, Trustees, Geo. W. Cowen Co., Inc.,* was opened in the same bank, and thereafter all funds derived from the operation of the business or which came into the hands of the Assignees as such were deposited in bank to the credit of *J. M. Henderson, Jr., and T. J. Scannell, Trustees, Geo. W. Cowen, Co., Inc.* Checks were properly drawn and signed as provided for in the resolution of September 24, 1920, and only those checks so signed were honored by the bank. All of the checks and vouchers were introduced in evidence at the time of the hearing before the referee in bankruptcy, and this fact stands uncontradicted.

Some months after the filing of the petition in bankruptcy and the adjudication of the bankrupt, J. M. Henderson, Jr., in an attempt to prevent the trustee in bankruptcy from reaching this fund, personally instructed the employees of the bank to destroy the records of the Assignees' account, and under his express instructions these records were destroyed. (Tr. Rec. pp. 112, 113, 114, 118.) The deposits, however, were at all times made in bank to the credit of the account of J. M. Henderson, Jr., and T. J. Scannell, Trustees, Geo. W. Cowen Co., Inc., which deposits even after the filing of the petition in bankruptcy on October 12, 1920, and up to the appointment of a receiver on November 4, 1920, had been made in this man-

ner. (Tr. Rec. p. 119.) Not only does the evidence disclose that J. M. Henderson, Jr., instructed a young man, one of the bookkeepers of the bank, to destroy the records, but we have the personal admission of Mr. Henderson that he so instructed this young man. (Tr. Rec. pp. 112, 113, 114-118.)

The claim of respondents that the sum of $12,883.81, deposited by the assignees, was applied by the bank in liquidation of a $15,000 note due from the bankrupt to the bank is not sustained by the evidence before the referee, but to the contrary the finding is adverse to this contention, the court holding that this transaction was but a subterfuge on the part of the respondent Henderson to prevent the trustee in bankruptcy from reaching the same. (Tr. Rec. pp. 115-117, 119-123; see also answer, Tr. Rec. p. 40.)

PROCEEDINGS BEFORE REFEREE AND COURT.

A. L. May, petitioner herein, after proceedings duly and regularly had, was on the 15th day of December, 1920, appointed trustee in bankruptcy of Geo. W. Cowen Co., Inc., bankrupt, and thereafter qualified as such. Immediately thereafter demand was made by the trustee upon J. M. Henderson, Jr., and T. J. Scannell, as assignees, for the said sum of $12,883.81. Upon their refusal to pay over this money, an application was filed by said A. L. May as trustee asking for a summary

order directing the said assignees to account for and turn over to him as trustee in bankruptcy the funds in question.

An order to show cause was issued, and answer was made by Messrs. Henderson and Scannell denying that the assignment in trust had ever become effective, or that they or either of them had acted as trustee; that Scannell had acted as manager of the bankrupt's business, had deposited moneys received from the sales with the Fort Sutter National Bank of Sacramento, and had checked against the deposit to pay current expenses, and that the amount deposited exceeded the withdrawals by $12,883.81. The further defense was set up that the said Fort Sutter National Bank and its successor in interest, the Sacramento-San Joaquin Bank, then held said sum and claimed said moneys as a partial setoff to a note of the bankrupt for $15,000, and that the claim of the bank was made in good faith. The answer further alleged that Henderson and Scannell were without the legal right or power to demand or retake the moneys, and that the referee, under the circumstances, had no jurisdiction to compel them to pay the money to the trustee in bankruptcy. (Tr. pp. 34-41, inclusive.)

A hearing was had upon the issues raised, and the referee held that the claim of said J. M. Henderson, Jr., and T. J. Scannell that the foregoing funds were no longer under their control *was not made in good faith,* but that there was then in the

hands of J. M. Henderson, Jr., and T. J. Scannell the sum of $12,883.81 belonging to the bankrupt's estate (Tr. p. 61), and directed said Henderson and Scannell to pay over to the trustee in bankruptcy herein the aforesaid sum of $12,883.81 within fifteen days from the date of said order. (Tr. pp. 43-45.)

Within the time required by the statute a petition for review of the order of the referee was filed (Tr. pp. 45-47, inclusive), and after consideration by the District Court an order was entered by the latter affirming the order of the referee directing payment to the trustee herein of the aforesaid sum of $12,883.81. (Tr. Rec. p. 7.)

Thereupon, the respondents took an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and at the same time filed a petition for revision of the order of said District Court, the matter being presented to said Court of Appeals, under stipulation, in one transcript (Tr. Rec. pp. 11-12). Subsequently the said United States Circuit Court of Appeals filed its opinion in pursuance of which a judgment was entered dismissing the said appeal and reversing the order of the said District Court on the said petition for revision. (Tr. Rec. pp. 227-228.)

A petition for rehearing was then filed by the trustee and denied by the said Circuit Court of Appeals. (Tr. Rec. p. 229.)

Thereupon, application for a writ of certiorari was filed in this court, and on October 15, 1923,

an order was entered by your honorable court granting the application of A. L. May, trustee in bankruptcy, for the issuance of such writ of certiorari, and this matter is now properly presented to this court for due consideration upon the merits, that is, whether the referee in bankruptcy had authority to issue the order requiring J. M. Henderson, Jr., and T. J. Scannell, assignees, to pay to the trustee in bankruptcy the sum of $12,883.81.

Questions Involved.

The questions now presented to this court for consideration are as follows:

(1) *Can duly and regularly appointed assignees for the benefit of creditors evade the consequences of a summary proceeding and deprive a court in bankruptcy of jurisdiction when it appears that the assignment was made within four months prior to the order of adjudication, and that funds received by such assignees were deposited in bank in a trust fund in their joint names as trustees, and have never been withdrawn by such assignees?*

(2) *Can the president of a national bank, while acting in a dual capacity as assignee for the benefit of creditors, by destroying and changing the records of the bank, divest himself as assignee of funds belonging to the bankrupt estate?*

(3) *Can assignees for the benefit of creditors take advantage of a wrongful act by the president*

of a bank, to assist such bank in perpetrating a fraud upon the creditors of said bankrupt, thereby divesting themselves, and depriving this court, of control over the funds rightfully in the possession of such assignees?

Argument.

ASSIGNEES FOR THE BENEFIT OF CREDITORS ARE ANSWERABLE IN SUMMARY PROCEEDINGS.

It is clearly established that assignees for the benefit of creditors are answerable to the summary jurisdiction of the bankruptcy court respecting funds in their hands belonging to the bankrupt estate. There are numerous decisions upon this point and the law may well be regarded as settled.

See

In re Rathman (Rathman v. Booth), 25 Am. B. R. 246, at 258, 183 Fed. 913.

"Assignees for the benefit of creditors and receivers for the benefit of creditors in insolvency or in winding-up suits appointed after four months prior to the filing of a petition in bankruptcy are not adverse claimants, but are only representatives of the bankrupt and his unsecured creditors within the meaning of section 23 of the Bankruptcy Law, because they have and claim no lien upon, right to, or interest in the property in themselves, for which they have given a valuable consideration. From them and from others holding the property of the bankrupt for him, including officers of other courts, who replevin or attach it without claim of lien upon, or right to the property in them-

selves, the bankruptcy court may by summary proceeding take the actual possession of the property and then when it has thus acquired the actual possession may by summary proceedings determine the validity of claims or liens upon and titles to it. *Mueller v. Nugent,* 184 U. S. 1, 14, 15, 7 Am. B. R. 224; *In re Watts and Sachs,* 190 U. S. 1, 27, 10 Am. B. R. 113; *White v. Schloerb,* 178 U. S. 542, 545, 546, 4 Am. B. R. 178."

TRUSTEES CANNOT RELIEVE THEMSELVES OF LIABILITY UNDER A TRUST AGREEMENT BY AN ATTEMPT TO AVOID THE OBLIGATION OF THE TRUST.

"A trustee must fulfill the purpose of the trust, as declared at its creation, and must follow all the directions of the trustor given at that time, except as modified by the consent of all parties interested, in the same manner, and to the same extent, as an employee."

Sec. 2258 Civil Code of California.

See also

Bemmerly v. Woodward, 124 Cal. 568, at 572.

"As the administration was left open because of the trust, Woodward was, of course, responsible as trustee, and should have kept the money invested for his beneficiaries."

The respondents here have contended that it was the understanding and intention that the trust created by the assignment agreement should not go into effect until it was consented to by all of the

creditors. No such declaration is found in the instrument, and in fact the creditor bank itself signed the same, setting forth the full amount of its claim of $15,000.

There never was any rescission.

> "The mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission."
>
> Sec. 2251 Civil Code of California.

The trusteeship then, having gone into effect, could only be dissolved either by the fulfillment of its object or by such object becoming impossible or unlawful.

> "A trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful."
>
> Sec. 2279 Civil Code of California.

Thus it will be noted that J. M. Henderson, Jr., having been directed and empowered by all of the parties in interest to direct and control the funds of the Geo. W. Cowen Co., and having clothed himself with this authority, and having actually come into possession of all of these funds, cannot now claim that the trust did not become effective, thereby releasing himself of responsibility, but, on the contrary, he must personally account for all moneys which since the 15th day of September, 1920, have come into his possession.

> "A trustee who uses or disposes of the trust property, contrary to section two thousand two

hundred and twenty-nine, may, at the option of the beneficiary, be required to account for all profits so made, or to pay the value of its use, and, if he has disposed thereof, to replace it, with its fruits, or to account for its proceeds, with interest."

Sec. 2237 Civil Code of California.

"A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner."

Sec. 2229 Civil Code of California.

See

Bermingham v. Wilcox, 120 Cal. 467, at 472.

"It was not necessary that there should have been an express agreement between them for a division of the management of the estate in order that one should be liable for the acts of the other. 'Where an executor by his negligence suffers his coexecutor to receive and waste the estate, when he has the means of preventing it by proper care, he is liable to the beneficiaries under the will for the estate thus wasted.' (Adair v. Brimmer, 74 N. Y. 539.)"

See also

Burns v. Clark, 133 Cal. 634;

Calmon v. Sarraille, 142 Cal. 638.

The respondents assume that a mere denial on their part that the funds in question are under their control is sufficient to divest the referee of the right to inquire into the facts respecting such contention, thus relegating the trustee to the filing of a plenary suit. This we do not understand to be the law.

otherwise it would nullify the force and effect of summary proceedings. It would deprive the bankruptcy court, through its referee, of exercising control of the funds properly belonging to the bankrupt estate, and might through long and tedious litigation prevent the recovery of such property. It is the function of the referee in bankruptcy in summary proceedings to inquire into the merits of a so-called adverse claim to the extent that if it shall be determined that funds or property are either in the possession or under the control of a respondent, and that adverse claim thereto is not made in good faith, or is false or fraudulent, or merely colorable, to find the same without valid foundation and the trustee entitled to the relief demanded.

The cases supporting this principle are numerous.

The case of

> *Schweer v. Brown*, 12 Am. B. R. 179, 130 Fed. 328, affd. 195 U. S. 171, 12 Am. B. R. 673,

subsequently affirmed by the Supreme Court, says:

> "The adjudication in bankruptcy operated to transfer to the trustee the title to all of the property of the bankrupt which was subject to distribution among his creditors. His obligation and his duty to surrender to the trustee property in his possession which belongs to the trustee, and not to him, cannot be converted into a debt, at his option, by his mere refusal to comply with the order of the court. *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224; *In re Purvine*, 2 Am. B. R. 787, 96 Fed. 192; *In re Rosser*, 4 Am. B. R. 153, 101 Fed. 562; *Ripon*

Knitting Works v. Schrieber, (D. C.), 4 Am. B. R. 299, 101 Fed. 810; Id. 104 Fed. 1006; *In re Schlesinger,* 4 Am. B. R. 361, 102 Fed. 117. These cases also furnish a conclusive answer to the claim of the bankrupt that his mere denial under oath of the possession of assets is conclusive, and that in such case the only remedy of the trustee and the creditors is by proceedings under the penal sections of the Bankrupt Act."

In the Matter of Stern, 32 Am. B. R. 281, at p. 283, 215 Fed. 979,

the court says:

"The mere denial of the bankrupt is by no means controlling."

In

Ellis Bros. Printing Co., 19 Am. B. R. 473, 156 Fed. 430,

it is said:

"Upon the authorities cited in the report of the master, the bankruptcy court has power to inquire into the facts for the purpose of determining whether any basis exists for the adverse claim of title to the property asserted by the respondent. The mere assertion of an adverse claim of title, even with an intention to protect it by the usual process of law, will not preclude the bankruptcy court from exercising its power to proceed summarily. *In re Andre,* 13 Am. B. R. 132, 135 Fed. 736, 68 C. C. A. 374. It is only when the evidence indicates that the asserted claim is not false or fraudulent that the bankruptcy court is deprived of jurisdiction. If it should appear from the proofs that the respondent, Strong, refuses to surrender the money collected by him to the trustee

simply on the ground that the title to the same is conclusively evidenced by his possession of it, or if the claim is unreal or colorable, then it is the duty of this court to direct its payment to the trustee. This principle of law is so clearly and definitely stated by the Supreme Court in *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, 22 Sup. Ct. 269, 46 L. Ed. 405, that no other citations are thought necessary.

In the prior cases decided by this court, in passing upon the right to exercise summary jurisdiction, it was not intended to be understood as holding that, irrespective of whether the elicited facts were sufficient in law, the mere assertion of an adverse claim of title or ownership deprived the court of summary power. If the proofs show that in fact there is no legal basis for the asserted adverse claim, the summary power of the court is not defeated."

In *Matter of Eddy*, 48 Am. B. R. 607, at page 609:

"The corporation has the right to assert that it is in rightful possession and an adverse claimant thereto. Such a determination cannot be made in view of the categorical denial by the bankrupt that the transfer was in bad faith. See *In re Briskman* (D. C., N. Y.), 13 Am. B. R. 57, 132 Fed. 201; *In re New York Car Wheel Works* (D. C., N. Y.), 14 Am. B. R. 595, 132 Fed. 203. There must be inquiry into the merits of such a controversy. It cannot here be determined on opposing affidavits. If in the judgment of the court the asserted adverse claim is colorable and in bad faith, a surrender of possession may be required summarily."

Probably the most important case settling conclusively the control of the bankruptcy court over all assets of a bankrupt from the date of the filing of the petition in bankruptcy is the case of

Mueller v. Nugent, 7 Am. B. R. 234, 184 U. S. 1.

Honorable Chief Justice Fuller, in delivering the opinion, says:

> "Does a mere refusal by the bankrupt or his agent so to deliver up oblige the trustee to resort to a plenary suit in the Circuit Court or a State Court, as the case may be?
>
> If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected, and to determine controversies relating thereto, would be seriously impaired, and, in many respects, rendered practically inefficient.
>
> The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the Bankrupt Law.
>
> It is as true of the present law as it was of that of 1867, that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction. Bank v. Sherman, 101 U. S. 407; and on adjudication, title to the bankrupt's property became vested in the trustee, secs. 70, 21e, with actual or constructive possession, and placed in the custody of the bankruptcy court."

A SUMMARY PROCEEDING MAY BE INVOKED TO ASCERTAIN THE TRUE FACTS AND TO PREVENT THE PERPETRATION OF A FRAUD.

"A trustee may not use the influence which his position gives him to obtain any advantage from his beneficiary."

Sec. 2231 Civil Code of California.

Such transactions are regarded as against public policy.

Wickersham v. Crittenden, 93 Cal. 17, 28-9.

"It is one of the peculiar functions of a court of equity to protect a *cestui que* trust against any violation by his trustee of his obligation, and to prevent any impairment of the trust fund, and in case of diversion or misappropriation of such fund by the trustee, to direct a restitution thereof, and to enforce such direction by some process appropriate to the exercise of its jurisdiction."

In the case of

In re Thompson, 11 Am. B. Rep. 719, 128 Fed. 575,

decided by the United States Circuit Court of Appeals of the Second Circuit, we find the following language:

"It is manifest that the court had jurisdiction to compel the assignee under the void state assignment to render an account. *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623, 45 L. Ed. 814. This proposition is not disputed. The petitioner, Murray, recognizing the authority of the court, appeared voluntarily before the referee, presented his account and gave testimony regarding it. Having once acquired jurisdiction of the proceeding, the

court did not lose it because the investigation took a wider range than the assignee expected or intended. His present contention, carried to its logical conclusion, is that the court acquired jurisdiction of those items which he chose to admit, but not to those which he chose to dispute, and that this jurisdiction was lost the moment he asserted a claim of title in his individual capacity. If this contention were sustained an assignee for the benefit of creditors could, by the mere assertion of a colorable claim, paralyze the arm of the court of bankruptcy and defeat the intent and purpose of the law."

THE FINDINGS OF THE REFEREE MUST BE SUSTAINED.

The summary order having been made by the referee in bankruptcy in accordance with the findings of fact, supported by the evidence, cannot now be disturbed. This principle of law has been sustained in numerous cases, and we content ourselves with citations from two of the leading cases. It is clearly stated by Mr. Justice Meek of the United States Circuit Court of Appeals, Fifth Circuit, in the case of

Stuart v. Reynolds (In re Reynolds), 29 Am. B. R. 412, at p. 415, 204 Fed. 709:

"This proceeding is brought here under the provisions of Section 24-b of the Bankruptcy Act. Therefore, we are not authorized to determine questions of fact upon which the order of the lower court is based, but may only superintend, and, if need be, revise its action in the matter of law. This is now the settled

interpretation given Sec. 24-b. *Matter of Loving*, 224 U. S. 183, 27 Am. B. R. 852" and other cases.

To the same point is

Epstein v. Steinfeld, 32 Am. B. R. 6, at 7, 210 Fed. 236.

The opinion of the U. S. Circuit Court of Appeals, Third Circuit, in that case states:

"The findings of the referee were made by him after he had taken a large amount of conflicting testimony covering every phase of the alleged withholding of property by the bankrupt, and when he had the opportunity to and did see the witness who testified. His findings, as has been decided over and over again, ought not to be disturbed except where it is demonstrated that a plain mistake has been made. This rule is so forcibly stated in Ohio Valley Bank Co. v. Mack (C. C. A. 6th Cir.) 20 Am. B. R. 40, 163 Fed. 155, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184, by Judge Lurton, that we quote it at some length:

'No arbitrary rule can be laid down for determining the weight which should be attached to a finding of fact by a bankrupt referee. His position and duties are analogous, however, to those of a special master directed to take evidence and report his conclusions, and the rule applicable to a review of a referee's findings of fact must be substantially that applicable to a master's report. *Tilghman v. Proctor*, 125 U. S. 137, 8 Sup. Ct. 894, 31 L. Ed. 664; *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; *Emil Kiewert & Co. v. Juneau*, 78 Fed. 708, 24 C. C. A. 294; *Tug River Co. v. Brigel*, 86 Fed. 818, 30 C. C. A. 415. Much in both cases must depend upon the character of

> the finding. If it be a deduction from established fact, the finding would not carry any great weight, for the judge, having the same facts, may as well draw inferences or deduce a conclusion as the referee. But if the finding is based upon conflicting evidence involving questions of credibility, and the referee has heard the witnesses, much greater weight naturally attaches to his conclusion, and the weight of authority is that the district judge, while scrutinizing with care his conclusions upon review, should not disturb his findings unless there is most cogent evidence of a mistake and miscarriage of justice. *Loveland on Bankruptcy*, section 32a; *In re Swift* (D. C., Mass.), 9 Am. B. R. 237, 118 Fed. 348; *In re Rider*, (D. C., N. Y.), 3 Am. B. R. 192, 96 Fed. 811; *In re Waxelbaum* (D. C., Ga.), 4 Am. B. R. 120, 101 Fed. 228; *In re Stout* (D. C., Mo.), 6 Am. B. R. 505, 109 Fed. 794; *In re Miner* (D. C. Ore.), 9 Am. B. R. 100, 117 Fed. 953. In this case the conclusions of the referee necessarily involved the credibility of the witnesses who testified to the *bona fides* of the claim preferred by Charles Mack, Sr. The conclusion he reached in favor of the validity of his debt has also passed the scrutiny of the district judge. Under such circumstances, this court is not warranted in overturning the conclusions of two courts upon anything less than a demonstration of plain mistake'."

It must be remembered that the trustee in bankruptcy was able to prove his case by the testimony of adverse witnesses, and that it was not without some considerable effort that the facts were established. Furthermore, it should be remembered that the referee in bankruptcy who sat at the various

hearings was in a position to judge not only as to the character of the testimony, but the general demeanor of the witnesses examined, and when he found that there was a fraudulent destruction of the records and concluded that the funds of the assignees were still under their control, the findings should not be disturbed.

The findings of the referee are amply supported, and we wish to call particular attention to the following contained in the referee's certificate (Tr. p. 54):

> *"The account in the Fort Sutter National Bank from and after that date was under the control absolutely of J. M. Henderson, Jr., who at all times was intimately advised and informed of the various transactions relating to the account."*

Again the referee finds the following which likewise we submit is amply supported by the evidence introduced in this case:

> "Finally, it is claimed on behalf of respondents that the Fort Sutter National Bank is not a party to the proceeding now before the referee, and that the claim of the trustee, if any, is a matter of a plenary action against the Fort Sutter National Bank. I cannot agree with this contention. Summing up the testimony of all the witnesses it conclusively appears that J. M. Henderson, Jr., as president of the Fort Sutter National Bank, at all times had and still has personal control of these funds. It is unquestionably true that a bank is custodian of money, and as such must recognize

the authorization or signature of the party in whose name the deposit is held by the bank. The bank cannot of its own accord change or transfer this account without the direct instructions of its depositor, and as J. M. Henderson, Jr., and T. J. Scannell were trustees under an express trust agreement entered into by them under their own signatures, which agreement was also consented to in writing by the bank, I must conclude that the bank had actual knowledge of all of the transactions, and having this knowledge could not, even though instructed by its president, transfer the account to others without the consent of the beneficiaries under the trust agreement. *I find further that J. M. Henderson, Jr., was the only officer in charge of the bank who at any time exerted any control over this account.*

For the foregoing reasons the referee finds that the claim of J. M. Henderson, Jr., and T. J. Scannell that the funds are no longer under their control is not made in good faith, but that there is now in the hands of J. M. Henderson, Jr., and T. J. Scannell the sum of $12,883.81, which should be paid to A. L. May, said trustee in bankruptcy."

THE OPINION OF THE U. S. CIRCUIT COURT OF APPEALS IS NOT SUPPORTED BY THE EVIDENCE.

Without undue criticism of the opinion of the esteemed justices of the United States Circuit Court of Appeals for the Ninth Circuit, we are constrained to believe that they have made deductions which are not in accord with the facts found by the referee in bankruptcy, and are in direct contradiction of the

evidence upon which such findings were based. We call attention to the following statement in the opinion:

> "It is conceded that the money is now in the custody of the bank and under its control; it is likewise conceded that the respondents have no deposit account in the bank, and we find nothing in the record which justifies the conclusion that the bank holds the money as a mere agent of the respondents, or in any other capacity, or for any other purpose than that stated in the answer. In other words, we find nothing in the record to impeach the claim of the respondents that the bank claims the money by title adverse to them, and that the money is not now in their possession or under their control." (Tr. Rec. 226.)

The following facts incorporated into the findings of the referee are to the contrary:

> "It is unquestionably true that a bank is custodian of money, and as such must recognize the authorization or signature of the party in whose name the deposit is held by the bank. The bank cannot of its own accord change or transfer this account without the direct instructions of its depositor." * * *. (Tr. Rec., pp. 60, 61.)

In order to reach the conclusion that the fund in question is beyond the control of the assignees, our learned justices, after deciding that

> "the money passed into the possession and under the control of the bank, and out of the

> possession and beyond the control of the respondents,"

declare,

> "To hold otherwise is to hold that entries in the books of a national bank are mere formalities, and may be changed at will."
> (Tr. Rec. pp. 225, 226.)

We have no quarrel with this latter statement but believe that such construction of the law must likewise establish the claim that the bank as a national institution could not falsify its records. The instructions by its president to destroy original ledger sheets and substitute in lieu thereof a different statement can serve no purpose. There can be no claim made, nor has there been any showing, that the bank was an innocent party and had no knowledge of the transaction, and although the bank at this time is not a party to the proceedings, due consideration must be given to the true facts so that the scheme of fraud evolved in the mind of J. M. Henderson, Jr., may be fully grasped. For that purpose, we again call to the attention of the court the fact that the assignment or trust agreement entered into on September 15, 1920, between the bankrupt, the assignees, and some of the creditors, did include the Fort Sutter National Bank as a party and a creditor in the sum of fifteen thousand dollars, and bears the signature of the bank. (Tr. Rec. p. 129.)

RESPONDENTS CAN COMPLY WITH THE SUMMARY ORDER OF THE REFEREE IN BANKRUPTCY.

Can it be said that any showing has been made by the respondents that they are unable to comply with the order to show cause, the funds now being beyond their control?

Since the application for the writ of certiorari was filed in this court, the United States Circuit Court of Appeals, for the Second Circuit of New York in November, 1923,

In the Matter of Edward M. Fuller & Co.,
Vol. 2 A. B. R. N. S. 149.

very clearly calls attention to the fact.

> "If a claim rests upon the mere pretense of fact or of law, it is colorable."

And further says:

> "A claim is adverse if the evidence offered has a basis for and is sufficient, if uncontroverted, to establish the validity of the claim."

What can be more in point than the language of this esteemed court, and what can be more clearly established in this case than the attempted claim on the part of the assignees to relieve themselves of responsibility by setting up a fraudulent claim that this fund is no longer in their possession or under their control?

Conclusion.

The Fort Sutter National Bank and the Sacramento-San Joaquin Bank, its successor, can have

no claim adverse to the trustee in bankruptcy. Their own records disclose that they have on deposit this money to the credit of the assignees, and the assignees at no time have issued a check for this balance on deposit. We do know that the assignees have refused not only to assist the trustee in bankruptcy, but admit that they are acting in aid of the bank. The assignees, J. M. Henderson, Jr. and T. J. Seannell should not by a mere statement be permitted to divest themselves of their trust.

We, therefore, submit that the order of the referee in bankruptcy was proper and should be sustained.

Dated, San Francisco,
September 22, 1924.

Respectfully submitted,
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HENRY G. W. DINKELSPIEL,
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1924

No. 126

In the Matter of GEO. W. COWEN CO., INC.,
Bankrupt.

A. L. MAY, as Trustee in Bankruptcy of Geo. W. Cowen Co., Inc. (a corporation), Bankrupt,
Petitioner,

vs.

J. M. HENDERSON, JR., and T. J. SCANNELL,
Respondents.

BRIEF FOR RESPONDENTS.

A. A. DELAUNE,
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ARCHIBALD M. JOHNSON,
Of Counsel.

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Respondents.

BRIEF FOR RESPONDENTS.

1. The bankrupt was indebted to the Fort Sutter National Bank of Sacramento in the sum of $15,000 evidenced by the note of the bankrupt. The moneys in question here were deposited in that bank. The bank offset or applied the moneys so deposited to

the note. Henderson was then the president of the bank and in its general control. He was also president in general control of the Sacramento-San Joaquin Bank, which afterward absorbed the Fort Sutter Bank. The banks—not Henderson or Scannell—were and ever since the appropriation of the money by the Fort Sutter Bank to the payment of the bankrupt's note, have been in possession of said money. This the evidence showed without dispute or question.

(Tr. beginning second line from bottom of pp. 115 to 118, also pp. 138-139.)

Also see opinion of the Circuit Court of Appeals. (Tr. p. 220 et seq.)

Henderson was president of the bank at the time the deposits were made and at the time the moneys were offset or applied on the note. This was done at Henderson's direction.

It is not claimed that Henderson was the sole owner of the bank, or that it was his alter ego, or agent or representative.

It follows that no matter whether the acts of Henderson or the bank were or were not legal Henderson has not the money and he and Scannel or either of them, cannot in a summary proceeding be compelled to restore that which they do not have or control to the trustee in bankruptcy.

This principle of law has been sustained by numerous cases in the federal courts.

It is clearly stated by Mr. Justice Gray of the Supreme Court of the United States, sitting in the Circuit Court of Appeals, Third Circuit, in the case of *American Trust Company of Pittsburg v. Wallis*, 126 Fed. 464. In that case the bankrupt collected and used moneys after having knowledge that a petition in bankruptcy had been filed against him. The opinion of the court in part stating as follows:

> "If the bankrupt denies that he has possession or control of the property, or, if a third person in possession thereof, claims to hold it, not as the agent or representative of the bankrupt, but by title adverse to him, and there is no evidence to indisputably show that such denial or claim is false or fraudulent, and that the case is one of simple concealment or refusal on the part of the bankrupt, or the one in possession, to deliver up the property as ordered, it would be an unwarranted stretch of power on the part of the court to resort to a summary proceeding for contempt for the enforcement of its order. In the absence of fraud or concealment, the bankrupt court can only order the delivery of property to the trustee which the bankrupt is physically able to deliver up, having the same in his possession or control. * * *
>
> The bankruptcy court is clothed with power, when the circumstances appear to warrant such proceedings, to have the bankrupt's property seized by the marshal or a special master immediately on the filing of the petition in bankruptcy. This power is a summary one, and can be exercised upon ex parte suggestion and was intended to meet the inconvenience suggested by appellant, of allowing the property of the bankrupt to remain in his possession and con-

trol and liable to be unlawfully made away with or concealed in the interval between the filing of the petition and the appointment of a trustee. A provision of this kind cannot always perfectly protect the creditors in their right to have the whole estate of the bankrupt segregated and guarded for their benefit. It does so as nearly as it can with due regard to fundamental principles and policies. It is better to fall short of an absolutely perfect administration of the theory of the bankrupt law, than to arm referee or court with powers of oppressions alien to the spirit of our laws and institutions."

As further support of this principle we quote from the syllabi of numerous cases as follows:

In re La Plume Condensed Milk Co., 145 Fed. 1013.

"The treasurer of a bankrupt corporation cannot be required by a summary order to turn over to the trustee money which he in fact paid out in settlement of debts of the corporation between the filing of the petition and the adjudication, even though such payments were not justified and resulted in preferences to the creditors receiving the same."

In re Berman, 165 Fed. 383.

"Evidence held insufficient to warrant a summary order requiring a bankrupt to pay over money to his trustee under the rule that such an order should not be made unless the bankrupt's ability to comply therewith is plainly and affirmatively shown."

In re Sax, 141 Fed. 223.

"A bankrupt should not be summarily ordered to pay over money or deliver property to

his trustee, unless the court is morally certain that he has been guilty of fraudulent concealment and that obedience to the order can be enforced. That he has failed to account satisfactorily for goods which went into his business is not sufficient to warrant such an order, where he denies the concealment of any money or property belonging to the estate, and the fact of concealment has not been made to appear by convincing evidence."

In re Smith, Longbottom & Sons, 142 Fed. 291.

"The fact that bankrupts improperly paid out money after the filing of the petition in bankruptcy, or otherwise expended it in good faith, is not ground for an order requiring them to pay it over to the trustee, where it is no longer in their possession or under their control."

In re Goldfarb Bros., 131 Fed. Rept. 643.

"To justify an order requiring a bankrupt to turn over money or property to his trustee under penalty of imprisonment for contempt, it must be shown clearly, satisfactorily and beyond a reasonable doubt, that he has such money or property in his possession or under his control. Where the evidence establishes only a strong probability that he has some money or property, which has not been accounted for, without furnishing any basis for a finding as to the amount, it is insufficient."

Epstein v. Steinfeld, 210 Fed. 236.

"An order, requiring a bankrupt to deliver property alleged to have been withheld from his trustee, should only be granted in case it appears that the bankrupt is physically able to deliver the property."

Stuart v. Renolds, 204 Fed. 709.

"A court of bankruptcy is without authority to make an order adjudging a bankrupt guilty of contempt for failure to obey an order of a referee requiring him to turn over property or money of the estate to his trustee, except on clear and convincing proof that he has present possession or control of the property or money and the ability to comply with the order."

In re Michie, 116 Fed. 749.

"BANKRUPTCY—JURISDICTION—ADVERSE CLAIM.

1. A court of bankruptcy has no jurisdiction over a controversy between the trustee and one to whom the bankrupt conveyed property, as to such property, where such person has possession, and makes a real, though fraudulent and voidable, adverse claim, and does not consent to the jurisdiction.

2. Petition of trustee in bankruptcy setting up a transfer to respondent by the bankrupt by way of preference and fraudulent conveyance shows a real adverse claim, excluding evidence that it was colorable."

In re Marks, 176 Fed. 1018.

"A bankrupt should not be committed for contempt for failure to comply with an order requiring him to turn over money to his trustee alleged to have been withheld where the court is convinced that the bankrupt is without physical ability to comply."

In re Nisenson, 182 Fed. 912.

"To sustain a referee's order requiring a bankrupt to surrender property alleged to have been withheld, it must be shown that the title to the property is in the trustee, and the possession and control thereof is in the bankrupt or in one who holds for him, or in his right."

In re Stern, 215 Fed. 979.

"In proceedings against a bankrupt to compel him to turn over assets alleged to have been withheld from his trustee, it is the duty of the court first to ascertain whether the property was in the bankrupt's possession or control at the time of the bankruptcy, and then whether the property is still in his possession and he is physically able to deliver it to the trustee."

Kirsner v. Taliaferro, et al., 202 Fed. 51.

"An order of a court of bankruptcy requiring a bankrupt to turn over property to his trustee, and committing him until he does so, made in a direct summary proceeding by the trustee, is reviewable only by petition to revise under Bankr. Act, July 1, 1898, c. 541, Sec. 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432).

To justify an order requiring a bankrupt to turn over property to his trustee, to be enforced by imprisonment for contempt until it is complied with, the evidence should establish the fact of his present ability to comply with the order beyond a reasonable doubt."

In

Shea et al. v. Lewis et al., 206 Fed. 877,

the court said:

"The bankruptcy court, however, has jurisdiction under an order to show cause to investigate and determine whether or not it had at the time the petition for the order to show cause was filed, or at any other time, actual possession of the property involved in the order and whether those asserting liens or title, have a substantial or only a frivolous and baseless adverse claim. Citing in re Ratham, 183 Fed. 913; Mueller v. Nugent, 184 U. S. 1; 46 L. ed.

405; Bryan v. Bernheimer, 181 U. S. 188; 45 L. ed. 14; Louisville Trust Co. v. Cominger, 184 U. S. 18; 46 L. ed. 413. If it had no such possession and if the claim asserted is actual and substantial as distinguished from one merely colorable and fictitious it may proceed no further but should decline to adjudicate on the merits without consent. If it errs in its ruling either way its action is subject to review. Mueller v. Nugent, 184 U. S. 1; 46 L. ed. 405. Such a claim may be adverse and substantial even though in fact fraudulent and voidable. Citing Johnston v. Spencer, 195 Fed. 215. Cooney v. Collins, 176 Fed. 189; In re Michie, Fed. 749."

In

First National Bank v. Chicago Title & Trust Co., 49 L. ed. 1051; 198 U. S. 280,

the court said:

"The distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of estates of bankrupts, is recognized in sections 23, 24 and 25 of the present act, and the provisions as to revision in matter of law and appeals were framed and must be construed in view of that distinction. (Citing authorities.) This distinction existed under the prior bankruptcy law and the then decision in respect of a proceeding in bankruptcy and an independent suit are applicable. It was settled that the bankruptcy court was without jurisdiction to determine adverse claims to property not in the possession of the assignee in bankruptcy by summary proceedings, whether absolute title or only a lien was asserted."

The facts of this case illustrate the impropriety of the order made by the referee and we apprehend

that there is no impropriety in our going outside the record to state that Henderson is no longer the president of either of the banks, nor is he an executive officer thereof nor has he any control over them or either thereof. He surely could not be imprisoned for contempt for not forcing the banks to pay the money to the trustee in bankruptcy if he has not, as in fact he has not, the power so to do.

2. Conceding for the purposes of argument only that Henderson did cause the money to be deposited in the Fort Sutter National Bank and also conceding for the purpose of the argument only that Henderson was at the time an assignee or trustee of the bankrupt's estate, and also conceding that Henderson caused the money so deposited to be applied to the note of the bankrupt held by the bank the result was, if anything illegal, an illegal preference of the bank and jurisdiction to try that question can be only in a plenary action.

Louisville Trust Co. v. Comingor, 184 U. S. 18; 46 L. ed. 413;

Bardes v. First National Bank, 178 U. S. 524; 44 L. ed. 1175;

Cooney v. Collins, 176 Fed. 189;

In re Middleton Contracting Co., 243 Fed. 56;

In re Noel, 137 Fed. 694;

In re Mitchie, 116 Fed. 749;

In re New York Car Wheel Works, 132 Fed. 203;

In re Knickerbocker, 121 Fed. 1004.

Henderson and Scannel denied that they acted as trustees or assignees of the bankrupt. Henderson denied he caused the deposits to be made in the bank in his and Scannell's names as trustees or otherwise. These issues the bank has a right to have tried in a plenary action.

The bank was not a party to the proceedings against the respondents.

Much is made in petitioner's brief of the fact that Henderson caused to be removed the pages of the loose sheet ledger showing the account in the names of Henderson and Scannel as trustees. If Henderson did not authorize deposits so to be made in his name jointly with that of Scannel, as trustees, he had a right to have the record corrected. No concealment of the fact was made by Henderson. His attorney volunteered the information at the hearing that the removal of the sheets was made on Henderson's orders.

It is respectfully submitted that the petition should be denied.

Dated, San Francisco,
October 11, 1924.

A. A. DeLigne,
Attorney for Respondents.

Archibald M. Johnson,
Of Counsel.

MAY, AS TRUSTEE IN BANKRUPTCY OF GEO. W. COWEN CO., INC., BANKRUPT, *v.* HENDERSON, ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 126. Argued March 5, 1925.—Decided April 13, 1925.

Within four months prior to the filing of the petition in bankruptcy against it, the bankrupt made a general assignment for the benefit of creditors to two trustees, one of whom, H., was the president of a bank to which the assignor was then indebted on a promissory note, and with which it carried a deposit account. The account was transferred, after the assignment, to the names of the trustees, as such, and afterwards augmented by deposits of money collected by them in carrying on the assignor's business. Partly before the date of the bankruptcy petition and partly thereafter, H., having control of the account, caused it to be applied to the note, with the tacit consent of the other assignee. The bank, as well as the assignees, had executed the creditors' agreement under which the assignment was made, providing for a *pro rata* distribution among all creditors and expressly extending the time of payment of all indebtedness of the assignor for the period of one year. *Held*, that the assignees were properly directed by the Bankruptcy Court, in a summary proceeding, to pay over to the trustee in bankruptcy an amount equal to the deposits, including the part paid the bank before the filing of the petition as well as the part paid thereafter. P. 115.

289 Fed. 192, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals, on petition to revise, reversing a judgment entered

by the District Court summarily in a bankruptcy proceeding, which required the present respondents to pay over a sum of money to the trustee in bankruptcy.

Mr. H. A. Jacobs, with whom *Messrs. Henry G. W. Dinkelspiel, G. B. Blanckenburg* and *Martin J. Dinkelspiel* were on the briefs, for petitioner.

Mr. A. A. DeLigne, with whom *Mr. Archibald M. Johnson* was on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

This is a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit to review its action (reported 289 Fed. 192) on a petition to revise an order of the District Court confirming the order of a referee in bankruptcy, summarily directing the respondents to pay over a sum of money to the trustee in bankruptcy.

On September 15, 1920, prior to but within four months of the filing of the petition, the bankrupt made to respondents, Henderson and Scannell, a general assignment for the benefit of creditors. At the time of the assignment the assignor was indebted on a promissory note in the sum of $15,000 to the Fort Sutter National Bank, of which respondent Henderson was president, and in which the assignor carried a deposit account. The referee found, on sufficient evidence, that the respondents accepted the trust under the assignment to them and continued the business of the assignor until the appointment of the receiver in bankruptcy on November 4, 1920, the petition in bankruptcy having been filed on October 9, 1920. In the meantime, the deposit account of the assignor with the bank, with the knowledge and assent of the assignees, was changed from the name of the assignor to the names of the assignees, as "trustees," and further deposits were from time to time made by them to the

credit of the account, in the course of their management of the business of the assignor. The assignor was duly adjudicated a bankrupt and, thereafter, the trustee in bankruptcy petitioned the Bankruptcy Court for an order directing the respondents, as assignees, to account for and pay over all moneys received by them from the date of the assignment to the date of the appointment of the receiver. Proceedings on the petition resulted in the order of the District Court directing respondents to pay over to the trustee an amount which would have stood to the credit of the assignees in their deposit account with the bank had the account not been closed in the following manner:

On September 30, 1920, ten days before the filing of the petition, the deposit account of the assignees with the bank was debited with the sum of $4,516.43, which amount was credited on the note of the bankrupt held by the bank, and on October 13, 1920, subsequent to the filing of the petition, and on various dates thereafter to and including October 25, 1920, further debits were made in the account which were credited on the note. These credits, including the first mentioned, amounted to the sum of $12,883.81, which was the amount directed to be paid over by respondents by order of the District Court. These debits and credits were made by direction of the respondent, Henderson, who throughout the period in question acted as one of the assignees and was also president of the bank. Although there was no explicit finding on the subject, the debits appear to have been made with the tacit assent of Scannell, the other assignee, who in any event appears to have left the management of the financial operations of the assignees to Henderson and made no objection or protest with respect to this use of the account standing to his credit as an assignee. We think that the finding of the Circuit Court of Ap-

peals that this application of the bank deposit on the note of the bankrupt constituted a "partial payment of the note as fully as if the assignees had given their check or withdrawn the money from the bank and paid it over the counter" is correct, and that both the assignees must be held legally responsible for this result. Where one of two co-trustees assents to a breach of trust by the other without objection, he is legally chargeable with liability for the breach. *Bermingham* v. *Wilcox*, 120 Cal. 467, 472; *Adair* v. *Brimmer*, 74 N. Y. 539; *Matter of Niles*, 113 N. Y. 547; *Hill* v. *Hill*, 79 N. J. Eq. 521.

The referee found that respondent Henderson was at all times from September 24, 1920, until the appointment of the receiver in bankruptcy, in control of the assignees' deposit account; and that he was the only officer of the bank who at any time exercised any control over the account, and that as president of the bank he at all times until the filing of the referee's report, had personal control of the funds deposited in the account; that the original ledger sheet of the bank showing the account standing in the names of the respondents as assignees, was destroyed by officials of the bank some time after the filing of the petition in bankruptcy and then an attempt was made to restore this account to the name of the bankrupt by rewriting the ledger sheets. He also found that on and after September 24, 1920, both the respondents and the Fort Sutter National Bank, which with respondents had on that date executed the creditors' agreement under which the assignment to respondents for the benefit of creditors was made, had actual knowledge of the insolvent condition of the bankrupt.

On the petition to revise, the Circuit Court of Appeals held that, when the money on deposit with the bank was applied on the note of the bankrupt, "the money passed into the possession and under the control of the bank and out of the possession and beyond the control of the re-

spondents . .; that the funds in the bank are not the funds of the president nor are they subject to his order and control, and an order directing him to pay over the money is not an order against the bank and is not binding upon the bank." The court accordingly held that the bank, which was not a party to this proceeding, held the funds received by it in its own right adversely to any claim of the assignees or the trustee in bankruptcy and could not be reached by a summary proceeding and it reversed the judgment and order of the District Court.

It is well settled that property or money held adversely to the bankrupt can only be recovered in a plenary suit and not by a summary proceeding in a Bankruptcy Court. *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18; *First National Bank of Chicago* v. *Chicago Title & Trust Co.,* 198 U. S. 280; *Gailbraith* v. *Vallely,* 256 U. S. 46. But property held or acquired by others for account of the bankrupt is subject to a summary order of the court, which may direct an accounting and a payment over to the trustee or receiver appointed by the Bankruptcy Court. *White* v. *Schloerb,* 178 U. S. 542; *Mueller* v. *Nugent,* 184 U. S. 1; *Babbitt* v. *Dutcher,* 216 U. S. 102; *Chicago Board of Trade* v. *Johnson,* 264 U. S. 1. Such is the rule with respect to assignees for the benefit of creditors within four months of filing of the petition. *In re Stewart,* 179 Fed. 222; *In re Rathman,* 183 Fed. 913; *In re Neuburger, Inc.,* 240 Fed. 947; *In re Diamond's Estate,* 259 Fed. 70, 74, and see *Bryan* v. *Bernheimer,* 181 U. S. 188. See *Louisville Trust Co.* v. *Comingor* and *Gailbraith* v. *Vallely, supra,* where, however, the jurisdiction was defeated by the adverse claim of the assignee arising before the filing of the petition; and see *Randolph* v. *Scruggs,* 190 U. S. 533, as to the nature of the title of the assignee for the benefit of creditors when bankruptcy ensues. See also *Taubel, etc. Co.* v. *Fox,* 264 U. S. 426, 433 and note. Courts of Bankruptcy do not permit themselves to be

ousted of jurisdiction by the mere assertion of an adverse claim. The court has jurisdiction to inquire into the claim for the purpose of ascertaining whether the summary remedy is an appropriate one within the principles of decision here stated. *Mueller* v. *Nugent, supra; Schweer* v. *Brown,* 130 Fed. 328, 195, U. S. 171; *Hebert* v. *Crawford,* 228 U. S. 204; *In re Ellis Bros. Printing Co.,* 156 Fed. 430. It may disregard the assertion that the claim is adverse if on the undisputed facts it appears to be merely colorable. *In re Weinger, Bergman & Co.,* 126 Fed. 875; *In re Rudnick & Co.,* 158 Fed. 223; *In re Ransford,* 194 Fed. 658; *Michaelis* v. *Lindeman,* 196 Fed. 718.

The petition upon which this proceeding was intitiated was in the usual form and prayed that the respondents be required to account for all moneys and properties coming into their hands as assignees or trustees under the assignment for the benefit of creditors. Such was their duty. Having assumed to take possession of the property of the bankrupt for its account, it was their legal duty to turn the property or its proceeds over to the trustee in bankruptcy or to account for their inability to do so by showing either a disposition of it in performance of a legal duty assumed toward the bankrupt or the bankrupt's trustee or by clothing themselves with the protection of a claim adverse to the bankrupt which was not merely colorable. As found by the Court, respondents came into the possession of moneys of the bankrupt which were by them placed on deposit to their credit as trustees or assignees for the benefit of creditors. The result of this transaction was that neither the bank nor the assignees held any specific money for account of the bankrupt and its creditors. They were creditors of the bank and the bank was their debtor. *Marine Bank* v. *Fulton Bank,* 2 Wall. 252; *Phoenix Bank* v. *Risley,* 111 U. S. 125. We are not therefore dealing with money in the possession

of the assignees or the bank in any literal sense, but the credit as a mere chose in action was held by the assignees for account of the bankrupt and they were bound to account for its proper disposition as for any other property coming into their hands.

The several amounts debited to the account, with the assent or connivance of the assignee subsequent to the filing of the petition, fall clearly within the rule that, as to property in the hands of the bankrupt or held by others for his account, "The filing of the petition is a caveat to all the world and in fact an attachment and an injunction." *Mueller* v. *Nugent, supra; Lazarus* v. *Prentice,* 234 U. S. 263; *Knapp & Spencer Co.* v. *Drew,* 160 Fed. 413; *In re Denson,* 195 Fed. 854; *In re Leigh,* 208 Fed. 486; *Gunther* v. *Home Ins. Co. et al.,* 276 Fed. 575; *Matter of R. & W. Skirt Co. et al.,* 222 Fed. 256; *Reed* v. *Barnett Nat. Bank,* 250 Fed. 983; and see *Acme Harvester Co.* v. *Beekman Lum. Co.,* 222 U. S. 300. See *Babbitt* v. *Dutcher,* 216 U. S. 102. In consequence, any person acquiring an interest in property of the bankrupt or his assignees for the benefit of creditors, adverse to the creditors, after the filing of a petition with notice of it, may be directed to surrender the property thus acquired by summary order of the Bankruptcy Court. *In re Denson, supra; In re Rudnick, supra;* and see *White* v. *Schloerb, supra.*

The rule is the same when a creditor secures payment of his debt from the bankrupt's estate after the filing of the petition. A summary order may be made directing repayment of the money to the trustee in bankruptcy. *Knapp & Spencer Co.* v. *Drew; In re Leigh; Matter of R. & W. Skirt Co., supra; In re Columbia Shoe Co.,* 289 Fed. 465. A like rule has been applied where a bank secures payment of its debt by setting up its lien or right of counterclaim against a deposit account of the bankrupt or the bankrupt's assignee, created subsequent to the filing

of the petition. *Michaelis* v. *Lindeman*, 196 Fed. 718; *Reed* v. *Barnett Nat. Bk., supra.* See *Farmers & Mechanics Bank* v. *Wilkinson, Trustee*, 266 U. S. 503. Any other rule would leave the Bankruptcy Court powerless to deal in an effective way with those holding property for the bankrupt who, pending the bankruptcy proceedings, wilfully dispose of it by placing it beyond the reach of the court. *Bryan* v. *Bernheimer*, 181 U. S. 188, 196.

We do not think, however, that respondents stand in any better position with respect to the first debit of $4,516.43 which was made a few days before the filing of the petition. The creditor's agreement, under which respondents were appointed assignees, and which was signed by them and by the Sutter National Bank, provided for only a pro rata distribution among creditors and expressly extended the time of payment of all indebtedness of the bankrupt for one year from the date of the creditors' agreement, which was dated September 15, 1920. The findings of the referee and the supporting evidence leave no doubt that Henderson, who with the assent of the co-assignee, Scannell, was in active control of the account both as an assignee for the benefit of creditors and for the bank as its president, directed this and all later debits to be made in the account, in fraud of the rights of creditors whom he assumed to represent.

There cannot, we think, be any pretense that the bank could assert a lien or counterclaim before the filing of the petition, in the face of its extension of its note by the creditors' agreement (*Fifth National Bank* v. *Lyttle*, 250 Fed. 361; *Heyman* v. *Third National Bank*, 216 Fed. 685), or at any time, in view of its transfer of the account to trustees for the benefit of creditors under the agreement signed by it. *Fitzgerald* v. *Bank*, 64 Minn. 469; *Lynman* v. *Bank*, 98 Me. 448. The findings of the referee and the evidence leave no doubt that the surrender or abandonment of their bank account to the bank by the assignees

and its attempted application by the bank to the payment of its note was collusive and without any substantial basis of legal right. At most it was a clumsy, ineffectual and fraudulent effort to divert the funds of the bankrupt to the payment of a favored creditor. While it is now settled that the claim of an assignee for the benefit of creditors, of the right to charge in his account expenses incurred or expenditures made prior to the filing of the petition in bankruptcy, is an adverse claim which cannot be adjudicated in a summary proceeding (*Louisville Trust Co.* v. *Comingor,* 184 U. S. 18; *Galbraith* v. *Vallely,* 256 U. S. 46), we think the rule cannot be extended to a case such as this where the claim is merely colorable and on its face made in bad faith and without any legal justification.

Nor is it any answer to such a proceeding that the diverted assets are no longer under the control of the assignees. They do not discharge the duty to account by showing that they assented to a cancellation of their bank account as assignees, and its application on an indebtedness of the bankrupt to the bank. The duty of a fiduciary to account for property entrusted to his care is fulfilled by delivery of the property, but if he has put it out of his power to deliver it, he may nevertheless be compelled to account for its worth. *United States* v. *Dunn et al., post,* p. 121. He is subject to the summary order of the Bankruptcy Court to restore the property to the bankrupt's estate. If he has sold it or mingled it with his own, he may be compelled by summary order to restore the value of the property thus wrongfully diverted. *In re Denson, supra,* and see *Bryan* v. *Bernheimer, supra,* at p. 197.

For that reason it is not necessary for us to enquire into the legal consequences which flow from the findings of the referee tending to show that the bank account was at all times under the control of Henderson, acting in

the dual capacity of assignee of the debtor and president of the creditor bank, or to ascertain whether such a situation falls within the rule that one acting in one capacity, subject to a summary order of the court, may not relieve himself from the duty to pay over money on a summary order by setting up that, although the money is still under his control, he holds it in a different capacity. See *Smith* v. *Longbottom & Son,* 142 Fed. 291. We rest our decision rather on the duty of assignees, for the benefit of creditors, to account in a summary proceeding for the property which they have received within four months of the bankruptcy and to make restitution of the value of the property of the bankrupt which they have dissipated without a colorable claim of right.

On the argument, respondents relied upon numerous cases in the District Courts and Circuit Courts of Appeals to the effect that the court will not in a summary proceeding make an order requiring a bankrupt to pay over money to his trustee unless the bankrupt's ability to comply therewith is plainly and affirmatively shown. *American Trust Co.* v. *Wallis,* 126 Fed. 464; *In re Berman,* 165 Fed. 383; *In re Sax,* 141 Fed. 223; *In re Goldfarb Brothers,* 131 Fed. 643; *Epstein* v. *Steinfeld,* 210 Fed. 236; *In re Nisenson,* 182 Fed. 912; *In re Stern,* 215 Fed. 979. But we think that a bankrupt who is shown to have turned over generally his assets and property to the receiver or the trustee in bankruptcy, is in a different situation from one not a bankrupt who is under a duty to account in a summary proceeding. A court of bankruptcy should not make useless orders. If the bankrupt has turned over his property generally to the Bankruptcy Court and is not shown to possess or control the specific property which is the subject of summary order, there may be a presumption that any order will be groundless. No such presumption obtains with respect to respondents. They have not shown that they are insolvent or in other

respects are unable to comply with the order of the District Court.

The judgment of the District Court was proper. The judgment of the Circuit Court of Appeals is

Reversed.